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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN P. WHITLEY, WARDEN,
LOUISIANA STATE PENITENTIARY,

Petitioner,

v.

WILBERT RIDEAU,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether mandatory reversal of respondent's conviction is compelled by the Constitution or an appropriate, but not constitutionally required, remedy for racial discrimination in the selection of grand jurors, where the systematic flaw in the charging process no longer exists nor requires continued adherence to a rule of mandatory reversal.

2. Whether the Fifth Circuit Court of Appeals erred in employing different standards in determining the applicable remedy in grand jury discrimination habeas corpus claims.

3. Whether the Fifth Circuit Court of Appeals ruling conflicts with relevant decisions of this Honorable Court regarding the harmless effect of the alleged error, considering the uncontroverted evidence of guilt.

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The petitioner, Burl Cain (hereinafter referred to as the "Petitioner" and the "State"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which reversed the district court's denial of Rideau's federal habeas corpus relief from his state court conviction for first degree murder.

OPINIONS BELOW

On May 17, 1999, the United States District Court, Middle District, denied the respondent's petition for writ of habeas corpus. (Appendix B).

On December 22, 2000, the United States Court of Appeals for the Fifth Circuit reversed the district court and issued an order granting the respondent's writ of habeas corpus, reversing his conviction and ordering his reindictment and retrial. (Appendix A).

It is the judgment of the United States Court of Appeals for the Fifth Circuit that is sought to be reviewed.

STATEMENT OF JURISDICTION

On January 22, 2001, the United States Court of Appeals for the Fifth Circuit denied the petitioner's petition for rehearing en banc. (Appendix C).

Therefore jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254.

STATEMENT OF FACTS[1]

The indictment of the respondent, Wilbert Rideau, (hereinafter referred to as the "Respondent" and "Rideau") arose out of the robbery of the Southgate Branch of the Gulf National Bank in Lake Charles, Calcasieu Parish, Louisiana, on February 16, 1961. In the robbery, Julia Ferguson, an employee of the bank, was killed.

The facts surrounding the offense may be stated briefly: At approximately 6:55 p.m. Rideau entered the bank and at pistol point forced three employees, Julia Ferguson, Dora McCain and Jay Hickman, to fill a suitcase with money. Rideau forced them into Julia Ferguson's automobile and directed them at pistol point to an uninhabited area of northeast Lake Charles. Rideau then ordered them out of the car, lined them up three abreast, and fired six shots at them. Jay Hickman ran to his right and fell into a bayou. Dora McCain fell directly in front of Rideau on the west shoulder of the road. Julia Ferguson fell near Dora McCain. When Julia Ferguson attempted to rise to her knees, Rideau stabbed her to death with his hunting knife.

PROCEDURAL HISTORY OF CASE

A. Rideau's First Conviction

On April 17, 1961, Rideau was convicted of the crime of first degree murder by a jury of twelve.

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1. The Statement of Facts contained herein are taken from Rideau's first direct appeal to the Louisiana Supreme Court. *State v. Rideau*, 242 La. 283, 137 So. 2d 283 (La. 1962), rehearing denied.

On April 20, 1961, the trial court sentenced Rideau to be executed by electrocution in accordance with the verdict and law.

On direct appeal of his first conviction, Rideau's conviction and sentence were affirmed by the Louisiana Supreme Court. One issue raised on appeal was the trial court's denial of Rideau's motion to quash the indictment and the general venire list, the general venire box, and the petit jury venire, where Rideau contended that they were not legally constituted and had not been properly designated as a jury commission under applicable state laws. *State v. Rideau*, 242 La. 431, 137 So. 2d 283 (La. 1962), rehearing denied.

Granting certiorari, this Honorable Court reversed the conviction of Rideau based on the denial of the trial court to grant a change of venue. *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963).

On remand from this Honorable Court, the trial court denied the state's motion for change of venue, and the state appealed. On appeal, the Louisiana Supreme Court reversed the trial court and granted the state's motion for change of venue. *State v. Rideau*, 246 La. 451, 165 So. 2d 282 (La. 1964), rehearing denied.

Thereafter, on July 27, 1964, the trial court in the Fourteenth Judicial District (Calcasieu Parish) ordered that venue be changed to the Nineteenth Judicial District (East Baton Rouge Parish), pursuant to order of the Louisiana Supreme Court issued on June 8, 1964.

B. Rideau's Second Conviction

Upon trial in East Baton Rouge Parish, Rideau was again convicted of murder, and, on November 10, 1965, Rideau was again sentenced to death, as mandated by law.

On direct appeal of his second conviction, Rideau's conviction and sentence were affirmed by the Louisiana Supreme Court. One issue raised on appeal was the trial court's denial of Rideau's motion to quash the indictment, the Calcasieu Parish general venire list, and the venire box, where Rideau contended that the general venire had come primarily from a list of registered voters and discrimination had been practiced in selecting the Calcasieu Parish Grand Jury that indicted Rideau. Rideau charged that there had been a systematic token inclusion of Negroes on the Grand Jury. *State v. Rideau*, 249 La. 1111, 193 So. 2d 264 (La. 1966), rehearing denied.

This Honorable Court denied certiorari. *Rideau v. Louisiana*, 389 U.S. 861, 88 S. Ct. 113, 19 L. Ed. 2d 128 (1967).

On May 12, 1969, after a hearing on Rideau's application for a writ of habeas corpus, a judgment and order of the United States District Court for the Eastern District of Louisiana was issued granting Rideau's application; the court vacated Rideau's conviction and death sentence, reserving the State's right to retry Rideau within a reasonable time in accordance with law. In his application, among numerous grounds, Rideau urged the issue of racial discrimination in the formation of the grand jury. However, all of those issues were pretermitted when the State conceded that the reversal of Rideau's conviction and sentence was required by the then

recent decision of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding a death sentence invalid when jurors were excluded for cause because of general objections to death penalty). *Rideau v. White*, USDC, Eastern District of Louisiana, Baton Rouge Division, Docket No. 970, Judgment and Order dated May 12, 1969.

C. Rideau's Third Conviction

Rideau was again retried in the Nineteenth Judicial District Court. On January 8, 1970, Rideau was again convicted of murder, and, on January 30, 1970, Rideau was again sentenced to death, as mandated by law.

On direct appeal of his third conviction, Rideau's conviction was affirmed by the Louisiana Supreme Court. One issue raised on appeal was the trial court's denial of Rideau's motion to quash the general venire list, grand jury venire, and indictment of the Grand Jury of Calcasieu Parish, and motion to quash the general venire list and petit jury venire in East Baton Rouge Parish, where Rideau contended that the venire lists did not represent a cross-section of the community and that there was racial discrimination in their composition. Rideau charged that there had been a systematic token inclusion of Negroes on the Grand Jury.

On direct appeal of this third conviction, the trial court ruling was affirmed. But the Louisiana Supreme Court concluded that, in light of the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), Rideau's death sentence could not be affirmed. Thus, the Louisiana Supreme Court annulled Rideau's death sentence and ordered the trial court to sentence him to life imprisonment. *State v. Rideau*, 278 So. 2d 100 (La. 1973).

D. Rideau's Habeas Corpus Application #1

Subsequent to his last conviction, Rideau and 28 other inmates serving life terms in the Louisiana State Penitentiary at Angola for murder or aggravated rape, committed in 1972 or earlier, filed a writ of habeas corpus seeking to be declared eligible for immediate parole consideration without regard to statutory precondition. The Nineteenth Judicial District Court, Parish of East Baton Rouge, held that the inmates were eligible for immediate parole consideration; however, that ruling was reversed on review. *Bosworth v. Whitley*, 627 So. 2d 629 (La. 1993), rehearing denied.

E. Rideau's Habeas Corpus Application #2

Rideau filed a petition for federal habeas corpus on July 27, 1994,[2] alleging that his indictment and conviction were unlawfully obtained by an unconstitutionally impaneled grand jury. The State moved for dismissal of Rideau's petition as untimely under Rule 9(a) of the rules governing habeas corpus procedure. A federal magistrate judge recommended that the federal district court deny the State's dismissal motion and grant Rideau's petition for a writ of habeas corpus.

The State timely objected to the magistrate's report and recommendation, and an evidentiary hearing was held on May 5, 1999. Thereafter, the United States District Court, Middle District, denied Rideau's petition for writ of habeas corpus

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2. Because Rideau's petition was filed before April 26, 1996, effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), its provisions amending the habeas corpus statute do not apply here. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).

and signed judgment to that effect on May 17, 1999. (Appendix B)

Rideau timely appealed to the United States Court of Appeals, Fifth Circuit. On December 22, 2000, the appellate court reversed and remanded to the district court with instructions to issue the writ of habeas corpus unless, within a reasonable time to be designated by the district court, the State should again indict and retry Rideau. *Rideau v. Whitley*, 237 F.3d 472, 2000 WL 1873829 (C.A. 5 (La) 2000). (Appendix A)

The State timely filed for a Rehearing En Banc; however, on January 22, 2001, the same panel which reversed the district court ruling issued a per curium; to-wit:

> Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (citations omitted), the Petition for Rehearing En Banc is DENIED. (Appendix C)

On January 26, 2001, the State timely filed a Motion to Stay the Mandate with the appellate court. On February 20, 2001, the appellate court denied the stay of the issuance of the mandate pending petition for writ of certiorari.

This application for writ of certiorari is now respectfully submitted to this Honorable Court.

REASONS FOR GRANTING THE WRIT

I.

There is no question as to Rideau's guilt. The two surviving victims testified at all three of Rideau's trials, identified him as the perpetrator, and were able to describe the horrid details of the evening of the offense. It was confirmed through Rideau's admissions and victim statements that Rideau knew each of the victims personally because he frequented the bank daily. For two years prior to the offense, Rideau worked in a business located a few doors down from the bank, in the same shopping center. Receipts proved that the day before the robbery, on Rideau's lunch hour, he went to a local pawn shop where he purchased the gun and knife he used in the offense. Rideau purchased the bullets used in the offense at a local surplus store. The next morning, Rideau brought the gun, knife and bullets with him to work. That afternoon, Rideau had a cheeseburger for lunch, returned to work and pretended to be sick so that he could get the rest of the day off from work. However, instead of going home, Rideau wasted time by hanging around different stores in the shopping center, slept in a car for a while, and then finally completed his preparation for the robbery; the latter established when he bought the bluish suitcase. Rideau waited until it was nearly time for the bank to close, when he entered the bank and told Mr. Hickman (one of the victims who survived) that there was a lady at the back door who needed to speak with him. Since Mr. Hickman knew Rideau, he was not suspicious and proceeded down the hall to the back door. At that point, Rideau pulled the gun on Mr. Hickman, forced him into the coffee room, ordered the other victims in the front of the bank, Ms. McCain and Ms. Furgeson, to close the shades, lock the front door and

come to the back. With his gun in hand, Rideau forced them back to the cashiers drawers in front of the bank and had Mr. Hickman put the money into his suitcase. After Mr. Hickman answered a telephone call from the main branch of the bank, Rideau decided to leave. When questioned by Rideau, Ms. McCain denied having her vehicle at work, but Ms. Furgeson admitted her vehicle was in the back parking lot. Rideau forced all three of them into Ms. Furgeson's vehicle and instructed her where to drive. During the ride to the remote outskirts of town, Rideau commented that the amount of money in the suitcase was certainly worth what he was doing. Once they arrived at the deserted location, Rideau ordered the three victims out of the car and to stand in a line. Rideau first pointed the gun at Mr. Hickman who begged Rideau not to use the gun and not to hurt him. After Rideau shot him, Mr. Hickman turned and attempted to run away but fell into a bayou a short distance away. Meanwhile, Ms. McCain pretended to faint so that Rideau would not kill her. However, her fainting did not convince Rideau, so he shot her in the back of the neck and then kicked her several times. Rideau then approached Ms. Furgeson and shot her as she begged for her life and asked him to think of her poor old father and how much he needed her. Rideau told Ms. Furgeson not to worry because it would be "quick and cool". Rideau then went over to the bayou to see if Mr. Hickman had drowned and when he returned to the car he found Ms. Furgeson trying to get up so he stabbed her in the throat and chest with the hunting knife. Believing he accomplished what he set out to do, Rideau got into the car and left all three of the victims for dead. After she was sure Rideau was gone, Ms. McCain made her way down the road, ducked in the ditches each time she saw headlights for fear that Rideau would return, until she finally found a home and got help. In the meantime, Mr. Hickman made his way out

of the bayou and back to the road where he found Ms. Furgeson. He, too, then proceeded down the road and hid in the ditches whenever he saw headlights for fear that Rideau would return, until he also finally found help. Ms. Furgeson died from the stab wound to her heart. Shortly thereafter, police apprehended Rideau while he was driving Ms. Furgeson's car with the bluish suitcase full of money in the backseat. Subsequent to his arrest, Rideau gave a handwritten confession and an on camera interview, admitting his involvement and guilt of the offenses.

It is unquestionable that Rideau committed this murder. Likewise, it is unquestionable that the systematic flaw of the past in the charging process has been rectified, no longer requiring the adherence to the rule of mandatory reversal.

Changes in society and in the law dictate that the values served by *stare decisis* yield in favor of a greater objective. Now is the time for this Honorable Court to reconcile the long-standing result with respect to the remedy applicable to properly cognizable claims of discriminatory exclusion of grand jurors (automatic reversal of convictions and a finding that the prisoner must be freed unless the State is able to successfully reconvict) and a rational system of justice.

To not address and fashion an appropriate rule of law would allow for the continued application of an outdated and unworkable remedy, and undermine the justness and fairness of the judicial system, as well as contribute to the deterioration of the integrity of our constitutional system of government, both in appearance and in fact.

Since 1880, state court convictions have been reversed on the ground that the indictment charging the offense had been issued by a grand jury from which blacks were excluded. *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 25 L. Ed. 664 (1880).

Thereafter, the Court repeatedly rejected all arguments that a conviction may stand despite racial discrimination. *See Vasquez v. Hillery*, 106 S. Ct. 617, 622, 474 U.S. 254, 261, 88 L. Ed. 2d 598 (1986) for list of historical cases. Nearly 100 years later, the Court explicitly addressed the question whether this unbroken line of case law should be reconsidered in favor of a harmless-error standard, and determined that it should not. *Rose v. Mitchell*, 443 U.S. 545, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979).

In *Vasquez*, supra, the Court addressed whether the long-standing remedy requiring a State to retry a defendant, sometimes years later, imposed an unduly harsh penalty for a constitutional defect bearing no relation to the fundamental fairness of the trial. The Court at p. 623 stated:

> [T]he remedy we have embraced for over a century — the only effective remedy for this violation — is not disproportionate to the evil that it seeks to deter. If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it.

The majority in *Vasquez* concluded that the harmless error rule does not apply to claims of grand jury discrimination. This conclusion followed from a line of cases going back over 100 years. In the dissent, Justice Powell,

with whom the former Chief Justice Burger and Justice Rehnquist joined, opined that:

> First, . . . , any error in the selection of the grand jury that indicted respondent is constitutionally harmless. Second, even assuming that the harmless-error rule does not apply, reversal of respondent's conviction is an inappropriate remedy for the wrong that prompts this case. *Id.*, at p. 626.

The dissent stated that the majority's position follows "from a misapplication of the doctrine of *stare decisis*." *Id.*. Adhering to precedent is usually the wise policy; nevertheless, the Court has never felt constrained to follow precedent. Instead, particularly where constitutional issues are involved, the Court has shown a readiness to correct its errors even though long standing.

According to the dissent, other precedent (holding, or clearly implying, that a conviction should not be reversed for constitutional error where the error did not affect the outcome of the prosecution), including more recent cases, should control. *Id.* at pp. 626-27 (citations omitted).

> Grand jury discrimination is a serious violation of our constitutional order, but so also are the deprivations of rights guaranteed by the Fourth, Fifth, Sixth and Fourteenth Amendments to which we have applied harmless-error analysis or an analogous prejudice requirement. Moreover, grand jury discrimination occurs *prior* to trial, while the asserted constitutional violations in most of the above cited cases occurred *during* trial. The

> Court does not adequately explain why grand jury discrimination affects the "integrity of the judicial process" to a greater extent than the deprivation of equally vital constitutional rights, nor why it is exempt from a prejudice requirement while other constitutional errors are not. *Id.* at p. 627.

It is unquestionable that race discrimination in grand jury selection is a constitutional violation. The question is whether reversal of respondent's conviction either is compelled by the Constitution or is an appropriate, but not constitutionally required, remedy for racial discrimination in the selection of grand jurors. The Constitution does not compel the rule of automatic reversal that the *Vasquez* Court applied. *See Hobby v. United States*, 468 U.S. 339, 104 S. Ct. 3093, 82 L. Ed. 2d 260 (1984) (although discriminatory selection of grand jury foreman violated the Constitution, reversing the petitioner's conviction was an inappropriate remedy for the violation since grand jury foremen play a minor part in prosecutions); *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) (suppression of evidence obtained in violation of *Miranda* is not constitutionally compelled); and *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (suppression of evidence obtained in violation of the Fourth Amendment is not constitutionally compelled).

The overriding imperative to eliminate the systematic flaw in the charging process no longer requires continued adherence to a rule of mandatory reversal. The systematic flaw and wrongs of the past have been long ago addressed and rectified. Accordingly, the utility of this remedy no longer serves a useful purpose of correcting any injustice to the

respondent or deterring conduct by state officials, and, if utilized, would cause an unduly burden and cost to society.

It is no longer required or appropriate to adhere to the mandatory reversal rule in cases where the justness of one's trial, conviction or incarceration are not questioned, as in the instant case. The respondent's admitted guilt and convictions, affirmed on direct appeal, establish that the grand jury's decision to indict was indisputably justified. As expressed by Justice Jackson in *Cassell v. Texas*, 339 U.S. at 301-302, 70 S. Ct. at 638-639: "Under such circumstances, it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict."

Furthermore, the remedy applied by the Court (mandatory reversal) conflicts with the relief applied by the Court in other cases. And, in fact, the application of law utilized by the Fifth Circuit Court of Appeals conflicts from case to case. See Section II. below.

As the dissent stated, ". . . it is impossible to conclude that the discriminatory selection of . . . grand jurors caused respondent to suffer any cognizable injury." *Vasquez*, at 631. Accordingly, the majority's opinion cannot be justified as a means of redressing any wrong to respondent.

Furthermore, the dissent stated:

> As respondent suffered no prejudice from the grand jury discrimination that prompted his claim, the Court's remedy must stand or fall on its utility as a deterrent to government officials who seek to exclude particular groups from grand juries,

> weighed against the cost that the remedy imposes on society. [Citation omitted] The Court properly emphasizes that grand jury discrimination is "a grave constitutional trespass," *ante*, at 623, but it leaps from that observation to the conclusion that *no matter when the claim is raised* the appropriate response is to reverse the conviction of one indicted by a discriminatorily [sic] selected body. That conclusion is not, as the Court erroneously suggests, compelled by precedent; equally important, it seriously disserves [sic] the public interest. *Id.*

The facts underlying the respondent's claim in no way established that, but for the alleged constitutional violation, no reasonable fact finder would have found him guilty of murder. This fact is made abundantly clear when one considers that this respondent was tried three separate times, before three separate juries and found guilty all three times. The respondent's claim of discrimination in no way involves the selection of the actual juries that convicted him.

It is impossible to conclude that the respondent herein suffered any cognizable injury, the outcome of the grand jury's decision to indict was in error, or the conviction would have been any different, especially in light of respondent's admission of guilt. Accordingly, there is no justification to afford the automatic reversal remedy ordered by the appellate court herein. Allowing the remedy to be implemented in this case would undermine the overwhelming cost to society and any sense of justice whatsoever.

In the State of Louisiana, the grand jury is simply an accusatory body which investigates crimes and determines

whether there is probable cause to believe that a crime has been committed. The grand jury does not determine guilt. Considering the overwhelming evidence of guilt in this case, it is indisputable that any grand jury, composed of any persons, would have indicted respondent. The respondent has had three separate trials with three different juries that heard all the evidence against him, held the State to the highest standard and found him guilty beyond a reasonable doubt.

Respondent's grand jury discrimination claim casts no doubt on the adequacy of the procedures used to convict him or on the sufficiency of the evidence of his guilt; thus, the Court should reverse the Court of Appeals' decision.

Inappropriately applying the remedy ordered and allowing the appellate decision to stand, where it is unlikely to deter and where its costs to society would be especially high, would likely ensure freedom to the respondent for no good reason. For no other reason, the Court of Appeals' decision should be reversed.

II.

The Fifth Circuit Court of Appeals has employed different standards in determining the applicable remedy in grand jury discrimination habeas corpus claims.

It is asserted that the finding by the state court, that the respondent failed to carry his burden of proving purposeful discrimination in the selection of the grand jury that indicted him, was one of fact. When reviewing the respondent's second conviction, the Louisiana Supreme Court stated:

"[T]he question of whether racial or other discrimination has been practiced in the formation of the jury bodies is one of fact." That state court finding of fact is entitled, therefore, to a presumption of correctness on federal review. *Sumner v. Mata*, 449 U.S. 539, 545-546, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981); *see Hillery v. Pulley*, 533 F. Supp. 1189 (E.D. Cal. 1982).

After conducting an evidentiary hearing, the federal district court concluded that Rideau had not proved that his "totally unreasonable" delay had not prejudiced the State's interest (the Rule 9(a) issue), and alternatively, the court denied Rideau's petition on its merits for failure to rebut with clear and convincing evidence the presumption that the state court's decisions were correct. The district court properly afforded the state court ruling the presumption of correctness required by law. The appellate court, however, substituted its own opinion, denying the presumption of correctness legally afforded to the state court finding of fact.

It is contended that the appellate court erred in failing to properly recognize the stipulations entered into by the parties at the federal district court evidentiary hearing; to-wit: that the jury commissioners are deceased and unavailable, the state court judges are deceased and unavailable, and the grand jury identification cards no longer exist. In addition, there is no evidence which exists in this case. The appellate court stated that the petitioner had not provided concrete evidence at that hearing. This is erroneous. The district court, properly considering the stipulations entered into by the parties at the hearing, found that the petitioner had made a "particularized" showing. However, the appellate court disregarded the findings of the district court, giving weight to the respondent's evidence while

dismissing the petitioner's evidence. There was no showing that the factual findings of the district court were erroneous or that the petitioner failed to carry its burden. In addition, the facts and record in this case alone clearly reflect prejudice to the petitioner.

In *James v. Whitley*, 39 F.3d 607 (5th Cir. 1994), a similar case (alleging grand jury foreman discrimination), the Fifth Circuit issued a ruling employing different standards in its determination, thus directly conflicting with its finding in *Rideau*.

In his challenge of the selection of the grand jury foreman, James was afforded an evidentiary hearing in state court on his claims. In his state court hearing, James presented the same type of evidence that Rideau presented at his two evidentiary hearings. After hearing all of the evidence, the state court held that James had failed to prove a *prima facie* case of discrimination.

The federal district court (Judge Polozola) granted James' habeas corpus petition without an evidentiary hearing, but considered the state court record in his decision.

On appeal, the Fifth Circuit reversed the district court ruling (finding that the facts in the state court record did not support the findings of the state court) and dismissed James' claim. It is significant that the Fifth Circuit did not remand the case for an evidentiary hearing, but instead dismissed the claim outright. The Fifth Circuit analyzed the case as if the state court findings were findings of fact. The Fifth Circuit held that the state court finding (that James had not made a *prima facie* case of racial discrimination) could only be overturned if the district court found that the record as a whole did not fairly support the state court findings. *James*, at 610.

A charge of discrimination in the selection of the grand jury foreman contains the exact same proof requirements as a charge of discrimination in the selection of the grand jury or grand jury venire. In *James*, dealing with discrimination of the grand jury foreman, the Fifth Circuit clearly gave the state court finding, that a *prima facie* case had not been proven, a presumption of correctness.

Therefore, based on the *James* decision, the state court finding that Rideau failed to prove a *prima facie* case of discrimination in the selection of the grand jury venire is a finding of fact and should also be afforded the same presumption of correctness as the state court ruling in *James*.

The Fifth Circuit employed different standards in determining the applicable remedy in grand jury discrimination habeas corpus claims, compelling and requiring this Court to exercise its supervisory power, and to decide and settle this important federal question.

III.

The Fifth Circuit decision conflicts with relevant decisions of this Honorable Court.

In *United States v. Mechanik*, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986), this Honorable Court ruled:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing

experiences. See *Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610 (1983). The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Eagle v. Isaac*, 456 U.S. 107, 127-128, 102 S.Ct. 1558, 1571-1572, 71 L.Ed.2d 783 (1982). Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," *id.*, at 128, 102 S.Ct., at 1572, and thereby "cost society the right to punish admitted offenders." *id.*, at 127, 102 S.Ct., at 1572. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's "interest in the prompt administration of justice," *United States v. Hasting*, supra, 461 U.S., at 509, 103 S.Ct., at 1981, and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. **But the balance of interest tips the other way when an error has had no effect on the outcome of the trial.** (emphasis added).

* * *

The grand jury has two principal functions. First, it bears the weighty responsibility of investigating crime and determining whether there is probable cause to believe that a crime has been

> committed. *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). The second, and no less important, task of the grand jury is to "serv[e] the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will." *Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct 1364, 1373, 8 L.Ed.2d 569 (1962).

In the instant case, the respondent has been tried and convicted three times. There is absolutely no question of his guilt or innocence; Rideau confessed to the crime and the victims who survived testified regarding his horrific actions regarding the murder.

The balance of interest tilts toward dismissal of the respondent's habeas corpus petition, thus supporting the district court ruling. Even if there were error in the selection of the grand jury, it clearly had no effect on the outcome of any of the respondent's three trials.

While not diminishing the fundamental and significant rights of criminal defendants, at some point, the interest of society and the prejudice incurred upon society must be viewed and seriously considered. And, at some point, the balance of interest tips in favor of societal interests. In this case, the balance of interest tilts to society, especially in light of the fact that the error had absolutely no effect on the outcome of either of the respondent's three trials.

When will the surviving victim and the families of the deceased victims be able to put this matter to rest? When will justice be served for them? The fundamental right to justice and fairness for law-abiding citizens of society must be recognized. This is already beginning to happen, as states are changing their constitutions and adopting victims rights legislation. This is perhaps the single most significant event in the lives of these victims and their families. They, no less than the respondent, have a legitimate interest in a fair adjudication of this case, and should therefore be afforded protection of their fundamental rights.

Surely, the victims and society have an equally important interest in this case. And, after nearly forty, years since the commission of one of the most horrific crimes in this parish, fundamental fairness and justice dictate closure and finality.

IV.

Rule 9(a) of the Rules governing § 2254 cases provides:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner show that it is based on grounds which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

A.

UNREASONABLE DELAY

The respondent has inexcusably delayed raising this ground in this current petition, especially in light of the fact that nearly 40 years elapsed since respondent's *actual* knowledge of the existence of this ground. The record in this case reflects that he had known for nearly 40 years that this ground has existed, yet he inexcusably failed to raise the issue. The respondent cannot present any reasonable basis for the delay in filing his habeas petition.

The respondent first attacked his indictment in his direct state court appeal from his first conviction. *State v. Rideau*, 242 La. 431, 137 So. 2d 283 (La. 1962), rehearing denied.

On his direct state court appeal from his second conviction, the petitioner challenged the trial court's denial of the petitioner's motion to quash the indictment, the Calcasieu Parish general venire list, and the venire box, where the petitioner contended that the general venire had come primarily from a list of registered voters and discrimination had been practiced in selecting the Calcasieu Parish Grand Jury that indicted the petitioner. The petitioner charged that there had been a systematic token inclusion of Negroes on the Grand Jury. On direct appeal of this second conviction, the trial court ruling was affirmed. *State v. Rideau*, 249 La. 1111, 193 So. 2d 264 (La. 1966), rehearing denied.

The United States Supreme Court denied certiorari. *Rideau v. Louisiana*, 389 U.S. 861, 88 S. Ct. 113, 19 L. Ed. 2d 128 (1967).

On his direct state court appeal from his third conviction, the respondent challenged the trial court's denial of his motion to quash the general venire list, grand jury venire, and indictment of the Grand Jury of Calcasieu Parish, and motion to quash the general venire list and petit jury venire in East Baton Rouge Parish, where the respondent contended that the venire lists did not represent a cross-section of the community and that there was racial discrimination in their composition. The respondent charged that there had been a systematic token inclusion of Negroes on the Grand Jury. On direct appeal of this third conviction, the trial court ruling was affirmed. *State v. Rideau*, 278 So. 2d 100 (La. 1973).

There is absolutely no doubt that the respondent had *actual* knowledge since 1961 of the existence of the ground which he now asserts. The record on its face unequivocally reflects this fact.

B.

PREJUDICE TO STATE

The respondent asserted this ground in these federal proceedings years after his *actual* knowledge of the existence of the ground, and years after the system being challenged has been amended. The assertion of this ground after the passage of many years — nearly 33 years — creates a undue burden and hardship on the State. Considering the passage of many years since the *actual* knowledge of the existence of this ground, it is difficult, if not impossible, to recollect what took place, and many participants are either dead or their whereabouts are unknown.

The interest of all would have been best served if the respondent had presented this claim immediately after his conviction, considering the fact that he had *actual* knowledge of the existence of this ground at that time. It would have been in the best interest of all for this claim to have been presented while the evidence was still fresh and available; and it is inexcusable for the respondent to have waited 33 years to present this ground in federal court.

In this particular case, the State is prejudiced by the fact that the persons involved when the original indictment was returned in 1961, such as members of the jury commission and former Clerk of Court, are either too elderly to recall the specific details concerning the ground raised by the respondent, or the participants are deceased, or their whereabouts are unknown.

Further prejudice is caused to the State by the respondent's actions herein because the conviction is subjected to attack indefinitely. The third and final conviction of the respondent was returned on January 8, 1970 — 39 years ago. Is it unreasonable for society to expect finality of a conviction? Without finality of a conviction, society is deprived of its rights, and the criminal law is deprived of much of its deterrent effect.

The State is additionally prejudiced because it has to continuously marshal precious resources to keep convicted criminals in prison, even where their trial and appeals have been reviewed by the appellate process. In this case, as discussed further below, the ground raised herein was in fact reviewed and rejected by the United States Supreme Court when that Court denied certiorari after the second conviction of the petitioner. *Rideau v. Louisiana*, 389 U.S. 861, 88 S. Ct. 113, 19 L. Ed. 2d 128 (1967).

Additionally, the State is prejudiced if a prisoner is granted relief many years after conviction because the State may be unable to successfully retry him. This result is not acceptable if it requires states to forego convictions of a guilty defendant through the erosion of memory and the dispersion of witnesses that occur with the passage of time. Nearly 40 years has passed since the return of the indictment against the respondent, creating an undue prejudice and burden on the State.

C.

LINK BETWEEN PREJUDICE AND DELAY

The prejudice suffered by the State is the direct result of the respondent's inexcusable delay in raising this claim in federal court many years earlier. The prejudice would not have resulted had the petition been filed at an earlier time, when, in fact, the respondent had *actual* knowledge of the existence of the ground.

Had the respondent exercised reasonable diligence, he could have raised this ground many years earlier, presenting the facts and circumstances of the alleged error long before the circumstances causing the prejudice to the respondent occurred. The delay is inexcusable and a classic abuse of the writ, especially in light of the following argument.

V.

ABUSE OF WRIT

The ground raised herein by the respondent was in fact reviewed and rejected by the United States Supreme Court when that Court denied certiorari after the second conviction of the petitioner. *Rideau v. Louisiana*, 389 U.S. 861, 88 S. Ct. 113, 19 L. Ed. 2d 128 (1967).

Additionally, the respondent inexcusably failed to assert this ground in his prior application for federal appellate review to this Court. *Rideau v. White*, USDC, Eastern District of Louisiana, Baton Rouge Division, Docket No. 970, Judgment and Order dated May 12, 1969.

In addition, despite the respondent's *actual* knowledge since 1961 of the existence of the ground which he now asserts, he has inexcusably failed to assert the issue in federal court until 33 years after his *actual* knowledge of its existence, and until 34 years after his 1970 conviction; the latest conviction. This is inexcusable and nothing more than an abuse of writ.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted by this Honorable Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED DECEMBER 22, 2000

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-30849

WILBERT RIDEAU,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana

December 22, 2000

Before DAVIS, SMITH and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

In this federal habeas corpus case, the petitioner claims that he was the victim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, in the selection of the Louisiana grand jury that indicted him for murder.

Appendix A

I.

The petitioner, Wilbert Rideau, was indicted on March 1, 1961, for the capital murder of Julia Ferguson, a bank employee, on February 16, 1961, in Calcasieu Parish, Louisiana. After his armed robbery of a bank in the city of Lake Charles, Rideau forced the victim and two other bank employees to accompany him in the victim's car to an uninhabited area outside the city. There he shot the three bank employees and stabbed the victim to death. The other two bank employees survived. *State v. Rideau*, 137 So. 2d 283, 286 (1962) (*Rideau I*).

Rideau was arrested on the evening of February 16, 1961, and confined in the Calcasieu Parish jail in Lake Charles. On the night of his arrest he made detailed oral and written confessions to the crimes. The next morning a sound film was made of Rideau, in the custody of state police officers, personally confessing to the crime in answer to leading questions by the Sheriff of Calcasieu Parish. The film was broadcast on the Lake Charles television station KPLC-TV on February 17, 18, and 19, 1961. *Rideau v. Louisiana*, 373 U.S. 723, 724-25 (1963); *see also id.* at 728 (Clark, J., dissenting).

After his motion for a change of venue was denied, Rideau was convicted of capital murder, La. R.S. § 14:30, by a jury and sentenced to death in the Fourteenth Judicial District Court, Parish of Calcasieu. On direct appeal to the Louisiana Supreme Court, the conviction and sentence were affirmed. *Rideau I.*

Appendix A

The United States Supreme Court granted certiorari and reversed Rideau's conviction and sentence. *Rideau v. Louisiana*, 373 U.S. 723 (1963). The court held "that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged." *Id.* at 726.

Upon remand of the case to the state Fourteenth Judicial District Court in Calcasieu Parish, the district attorney moved the trial court to order Rideau to show cause why a change of venue should not be made to a Parish outside the range of KPLC-TV in Lake Charles. Rideau joined in the motion. The state district court denied the motion, but the Louisiana Supreme Court reversed, granted the motion, and ordered the trial judge to grant a change of venue. *State v. Rideau*, 165 So. 2d 282 (La. 1964).

Venue was changed to the Nineteenth Judicial District Court for the Parish of East Baton Rouge. Prior to trial Rideau, who is an African-American, moved to quash his 1961 indictment by the Calcasieu Parish grand jury on the ground that there had been a systematic exclusion, through a token inclusion, of black jurors from the grand jury. After an evidentiary hearing, his motion was denied. Rideau was convicted by a jury of capital murder in East Baton Rouge Parish, La. R.S. § 14:30, and sentenced to death. The Louisiana Supreme Court affirmed the conviction and sentence. *State v. Rideau*, 193 So. 2d 264 (La. 1967) (*Rideau II*). The court held that Rideau had failed to establish discrimination or any impropriety in the formation of the

jury bodies. The United States Supreme Court denied certiorari. *Rideau v. Louisiana*, 389 U.S. 861 (1967). Racially discriminatory grand jury selection was one of the many errors unsuccessfully urged in Rideau's petition for certiorari.

In 1967, Rideau petitioned the United States District Court for the Eastern District of Louisiana for a writ of habeas corpus. Among numerous grounds, Rideau urged the issue of racial discrimination in the formation of the grand jury. However, all those issues were pretermitted when the State conceded that reversal of Rideau's conviction and sentence was required by the recent decision of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding a death sentence invalid when jurors were excluded for cause because of general objections to death penalty). Accordingly, the federal district court, on May 12, 1969, vacated Rideau's conviction and death sentence, reserving the State's right to re-try petitioner within a reasonable time in accordance with law. S.J.T. III, at 16-17.[1]

Prior to his retrial, Rideau again moved the Nineteenth Judicial District Court in East Baton Rouge Parish to quash his 1961 indictment by the Calcasieu Parish grand jury because of racial discrimination in selection of jury venires and their failure to represent a cross-section of the

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1. To distinguish between the records in the trials and proceedings involved in this appeal, we cite the records in the state jury trials and the federal habeas proceedings as follows: first, second, and third state jury trial records as "S.J.T. I, II, and III"; the federal district court's habeas proceeding record on the instant petition as "F.H.P." A copy of the federal district court's grant of habeas relief in 1969 is filed in S.J.T. III, at 16-17.

community. After an evidentiary hearing, Rideau's motions were denied. Rideau was convicted by an East Baton Rouge Parish jury of capital murder and sentenced to death.

On appeal to the Louisiana Supreme Court, Rideau argued numerous bills of exception, including an objection to the district court's denial of his motion to quash his indictment. The court rejected all of Rideau's bills as being without merit and affirmed his conviction. *State v. Rideau*, 278 So. 2d 100, 103-06 (La. 1973) (*Rideau III*). But the court concluded that, in light of the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), Rideau's death sentence could not be affirmed. Therefore, the Louisiana Supreme Court annulled Rideau's death sentence and ordered the trial court to sentence him to life imprisonment. *Rideau III*, 278 So. 2d at 106. Rideau's counsel advised him that nothing further could be done for him in the courts and, therefore, did not petition the United States Supreme Court for certiorari.

Rideau filed this petition for federal habeas corpus on July 27, 1994,[2] alleging that his indictment and conviction were unlawfully obtained by an unconstitutionally impaneled grand jury. The State moved for dismissal of Rideau's petition as untimely under Rule 9(a) of the rules governing habeas corpus procedure. A federal magistrate judge recommended that the federal district court deny the State's dismissal motion and grant Rideau's petition for a writ of

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2. Because Rideau's petition was filed before the April 26, 1996, effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), its provisions amending the habeas corpus statute do not apply here. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).

habeas corpus. After an evidentiary hearing, however, the federal district court denied Rideau's petition and granted the State's Rule 9(a) motion. The court concluded that Rideau had not proved that his "totally unreasonable" delay had not prejudiced the State's interests. Alternatively, the court denied Rideau's petition on its merits for failure to rebut with clear and convincing evidence the presumption that the state court's decisions were correct. Rideau appealed.

II.

First, we must decide whether the district court correctly dismissed Rideau's petition for a writ of habeas corpus as untimely under Rule 9(a) of the Rules Governing Section 2254 Cases ("Section 2254 Rules"). Rules Governing Section 2254 Cases in the United States District Courts, R. 9(a), 28 U.S.C. foll. § 2254.[3]

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3. We review the grant of a Rule 9(a) dismissal under the same standard of review we employ for the grant of summary judgment. *McDonnell v. Estelle*, 666 F.2d 246, 250 (5th Cir. 1982). Therefore, we employ a de novo review, judging the propriety of the Rule 9(a) dismissal under the same standard a district court should use: "all reasonable doubts must be resolved in favor of [Rideau]. If there are unresolved factual issues, the motion must be denied. If there are no factual issues to be resolved, the court must decide whether [the State] is entitled to judgment as a matter of law." *Id.*; *see also* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4268.2 at 504-05 (2d ed. 1988).

Appendix A

A.

Rule 9(a) of the Section 2254 Rules allows for the dismissal of habeas petitions that are filed in a delayed manner under limited circumstances:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

28 U.S.C. foll. § 2254 (2000).[4]

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4. In its original form as proposed by the Supreme Court, the rule would have included a provision creating a presumption that the State was prejudiced by delays of more than five years. However, the House Judiciary Committee struck that provision from the rule passed by Congress, stating that "it is unsound policy to require the defendant to overcome a presumption of prejudice." H.R. Rep. No. 1471, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S.C.C.A.N. 2478, 2481; *see also Wise v. Armontrout*, 952 F.2d 221, 223 & n.5 (8th Cir. 1991) (collecting cases from the 5th, 10th, and 11th circuits rejecting the notion that the original formulation of the proposed rule created a presumption that extraordinarily long delays created prejudice as a matter of law); *Strahan v. Blackburn*, 750 F.2d 438, 441 (5th Cir. 1985) (observing that the effect of such a provision — in creating a statute of limitations for habeas petitions — is arguably prohibited by the Constitution's mandate against suspension of the habeas writ (citing U.S. CONST. art. I, § 9, cl. 2)); *Marks v. Estelle*, 691 F.2d 730, 732 n.3 (5th Cir. 1982); *McDonnell*, 666 F.2d at 251.

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The State bears a heavy burden under Rule 9(a) to "(1) make a particularized showing of prejudice, (2) show that the prejudice was caused by the petitioner having filed a late petition, and (3) show that the petitioner has not acted with reasonable diligence as a matter of law." *Walters v. Scott*, 21 F.3d 683, 686-87 (5th Cir. 1994); *see also Strahan*, 750 F.2d at 441 (5th Cir. 1985). The State must make a particularized showing of prejudice to its ability to respond to the habeas petition. *Walters*, 21 F.3d at 687; *see also Strahan*, 750 F.2d at 441. Mere passage of time alone is never sufficient to constitute prejudice. *Walters*, 21 F.3d at 687; *see also Strahan*, 750 F.2d at 441; *McDonnell*, 666 F.2d at 251; *see, e.g., Bedford v. Attorney General of Alabama*, 934 F.2d 295, 299-300 (11th Cir. 1991) (refusing to grant Rule 9(a) dismissal where The State did not show particularized prejudice from 19-year delay between finality of conviction and commencement of any post-conviction relief efforts); *Campas v. Zimmerman*, 876 F.2d 318, 324 (3d Cir. 1989) (same, regarding a 17-year delay between conviction and filing for federal habeas relief); *Hannon v. Maschner*, 845 F.2d 1553, 1557 (10th Cir. 1988) (same, regarding a 25-year delay between finality of conviction and filing for federal habeas relief); *Buchanon v. Mintzes*, 734 F.2d 274, 281-82 (6th Cir. 1984) (same, regarding a 23-year delay between conviction and filing for federal habeas relief); *Sutton v. Lash*, 576 F.2d 738, 744 (7th Cir. 1978) (same, regarding 21-year delay between finality of conviction and filing for federal habeas relief); *Hairston v. Cox*, 459 F.2d 1382, 1386 (4th Cir. 1972) (refusing to grant dismissal on theory of laches, which Rule 9(a) subsequently codified, regarding 26-year delay between finality of conviction and filing for federal habeas relief); *Hamilton v. Watkins*, 436 F.2d 1323,

1326 (5th Cir. 1970) (same, regarding a 38-year delay between conviction and filing for federal habeas relief); *Hawkins v. Bennett*, 423 F.2d 948, 951 (8th Cir. 1970) (same, regarding 42-year delay between finality of conviction and filing for federal habeas relief). Prejudice to the State's ability to retry or reconvict the petitioner is irrelevant. *Walters*, 21 F.3d at 687 (citing *Vasquez v. Hillery*, 474 U.S. 254, 264-65 (1986); 17A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 4268.2 (2d ed. 1988) (first edition to same effect quoted with approval in *Strahan*, 750 F.2d at 441)).

"[L]apses of time that affect the state's ability, but that do not make it 'virtually impossible' for the state to respond, [do not] require dismissal." 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 24.3 at 928-29 (3d ed. 1998) (citing, inter alia, *Baxter v. Estelle*, 614 F.2d 1030, 1035 (5th Cir. 1980); *Strahan*, 750 F.2d at 443-44; *Galtieri v. Wainwright*, 582 F.2d 348, 357 n.20, 358 (5th Cir. 1978) (en banc) (dicta)). "Accordingly, as to claims based on in-court proceedings or ones that otherwise were recorded, the state generally must show *both* that the transcript is unavailable *and* that participants in the proceeding — the presiding judge, court reporter, prosecutor, petitioner's trial attorney, law enforcement officials, and the like — are unavailable or unable to remember the critical events." *Id.* at 929 (emphasis in original) (comparing *Walters*, 21 F.3d at 687-89, *Bedford*, 934 F.2d at 299-300, and *Smith v. Duckworth*, 910 F.2d 1492, 1495 (7th Cir. 1990), with *Walton v. Attorney General*, 986 F.2d 472, 476 (11th Cir. 1993); and citing generally *Harris v. Pulley*, 885 F.2d 1354, 1365-67 (9th Cir. 1989), and *Strahan*, 750 F.2d at 441 n.4). "To determine whether this burden is met, the court generally

must conduct a hearing on the question and make specific findings as to prejudice." *Id.* at 929-30 (citing *Walters*, 21 F.3d at 687 (finding State's claim of witness's memory loss insufficient to prove prejudice without a hearing to determine the precise extent of witness's recollection)); *Hannon*, 845 F.2d at 1556 n.6; *Lawrence v. Jones*, 837 F.2d 1572, 1574-75 (11th Cir. 1988) (finding that, because the State was required to show "that the prejudice would not have resulted had the writ been filed at an earlier time, [t]he district court needs to determine when the prejudicial deaths occurred and any other circumstances that would show that Alabama would have been in a position to show the facts surrounding [the petitioner's] conviction had he only brought his claim earlier" (citation omitted); *McDonnell*, 666 F.2d at 254-55).

If the State makes its prima facie showing of prejudice, then the burden shifts to the petitioner, who must show either (1) that the State's showing of prejudice is false, or (2) that the delay resulted from grounds that the petitioner could not have known of through reasonable diligence prior to the occurrence of the prejudicial circumstances. *Walters*, 21 F.3d at 687; *see also Strahan*, 750 F.2d at 441.

Rule 9(a) codifies the application of the equitable doctrine of laches to habeas corpus petitions. *Walters*, 21 F.3d at 686 (citing *Strahan*, 750 F.2d at 440). "The application of Rule 9(a) must be carefully limited to avoid abrogating the purpose of the writ of habeas corpus." *Id.* (citing *McDonnell*, 666 F.2d at 251; *Hannon*, 845 F.2d at 1557).

Appendix A

B.

Rideau's habeas claim, asserting that the Calcasieu Parish grand jury that indicted him was unconstitutionally formed through racially discriminatory selection procedures, is based primarily on the transcripts of the two pretrial evidentiary hearings held in the East Baton Parish state court on his motions to quash the Calcasieu Parish grand jury indictment and grand jury bodies. The transcript of the first hearing on November 5, 1964, was introduced as evidence in the second hearing on December 15, 1969. Both have been made part of the record of this appeal.

Acton Hillebrandt was elected Clerk of Court of Calcasieu Parish in 1948 and, as such, served as an ex-officio member of its jury commission. As he was still in office during both evidentiary hearings, he was called at each proceeding to testify as to the jury commission's procedures used to select the Calcasieu jury bodies. At the first evidentiary hearing, Mr. Hillebrandt testified that he had attended every meeting of the jury commission except possibly one since 1948. He testified that the commission obtained the names, race, and other data regarding prospective jurors from the parish registrar of voters and other sources. The commission prepared an identification card for each potential venire person showing his or her race and other information. During his testimony, Mr. Hillebrandt examined one of the identification cards and affirmed that it indicated the race of the venire member. The commission, consisting of Mr. Hillebrandt and five other commissioners appointed by the court, all of whom were white men, met together and selected the names from the cards to make up a

general venire list of 300 people. The commission selected twenty people from the general venire to form the grand jury venire. They "pick[ed] any name that they thought would be a good grand juror . . . levelheaded." They did not select the jurors by lot or randomly. Mr. Hillebrandt testified that, as a rule, he selected people based on their occupations or his personal knowledge of them. He stated that he made it a point to put a "member of the colored race" on every grand jury that he drew. He testified that, because a conviction had been reversed "many years before" Rideau's grand jury was selected, the commissioners "all knew that they might as well be sure there was some Negroes in the panel[.]" On the other hand, Mr. Hillebrandt testified that a person's race would not qualify or disqualify him from serving on either the grand or general jury venire. In response to a question by the State's attorney, Mr. Hillebrandt agreed that the practice and procedure that the commission followed in connection with the grand jury venire in Rideau's case was "one of long standing and of long vintage." He added that, when the grand jury venire was selected, "we had no idea what would come before it, Rideau or who." Mr. Hillebrandt also testified that grand jury foremen were selected from the grand jury venire by the presiding judge, and that to his knowledge no member of the "colored race" had ever served as foreman. He stated that, from the names of the venire members on the grand jury venire list, he could tell that at least one of the twenty venire persons in Rideau's case was black and that sixteen were white. Rideau's attorney subsequently introduced the jury commission's identification cards for the three remaining grand jury venire members, indicating that those three venire members were white, along with an affidavit by Mr. Hillebrandt verifying the authenticity of the cards and explaining the racial coding contained on them.

Appendix A

In addition, Rideau introduced as evidence two of the identification cards used by the commission in drawing general and grand jury venires, showing how the cards indicated each potential venire member's race with either a "W" or an "N"; the 1960 U.S. Census results for Calcasieu Parish indicating that 18.5% of the Parish's male population over the age of 21 was African-American; and an affidavit by the Calcasieu Parish Registrar of Voters providing a breakdown of registered voters by race, showing that approximately 16% of the registered voters were African-Americans.

At the second evidentiary hearing, Mr. Hillebrandt gave a similar description of the jury commission's procedures. He admitted that neither he nor any other commissioner, to his knowledge, had ever made a conscious effort to discover or solicit potential jurors from the black community. Mr. Hillebrandt testified that, after the 300 general venire members were selected, their identification cards were placed in a metal container, and names were drawn therefrom to select the twenty-person grand jury venire. Mr. Hillebrandt testified that "usually you couldn't help but be" conscious of the race of the individuals in selecting the grand jury venire because the cards bore either a "W" or an "N" to denote race. Rideau also introduced as evidence four of the original twenty race-coded cards from which the jury venire was selected, the 1960 Census information, the voter registrar's affidavit, and the transcript of the 1964 evidentiary hearing.

In overruling Rideau's motion to quash after each hearing, the state trial court assigned differing reasons. After the first hearing, the court concluded that the commissioners

properly took into account the race of potential venire persons to determine whether they were of good character and standing; that the commission's access to this information was not improper because there was no showing of purposeful exclusion or inclusion on the basis of race; and that the commissioners had no duty to go out and investigate 300 people. After the second hearing the court overruled the motion to quash because "the authority to that by which I am bound, whether I agree or disagree, is the *Banks* case wherein the Supreme Court had before it these same principles."[5]

In appealing his third conviction to the Louisiana Supreme Court, Rideau again argued, among numerous other issues, that the trial court committed reversible error in denying his motion to quash the Calcasieu Parish grand jury bodies and indictment because of racial discrimination in the bodies' composition. In rejecting this argument, the Louisiana Supreme Court stated:

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5. We have been unable to find the "*Banks* case," upon which the state trial court relied without citation. It is possible that the court was referring to the similarly named relevant case of *Eubanks v. Louisiana*, 356 U.S. 584 (1958). If so, the court misread *Eubanks*, which held that "a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race[,]" and concluded "that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges." *Id.* at 585, 587.

Appendix A

The majority of the contentions raised by defense counsel in this bill of exceptions were presented on appeal and considered by us in [*Rideau II*]. In deciding adversely to defendant, we stated:

> Fairness in the formation of the jury bodies is a fundamental requirement, long recognized by this Court. . . . Both the state and federal constitutions require that jury bodies be selected without discrimination because of race. A planned limitation of the number of negroes selected to serve on the grand jury imposed on the basis of race is prohibited. . . .
>
> The question of whether racial or other discrimination has been practiced in the formation of the jury bodies is one of fact. . . . The burden of establishing such discrimination rests upon the defendant. . . .
>
> The Jury Commission of Calcasieu Parish selected the list of Grand Jurors on January 5, 1961, before the commission of the crime charged. Clearly, therefore, no action of the jury officials could have been designed to prejudice the defendant.

Appendix A

> Out of an abundance of caution, we have studied this bill and find that defendant has not shown that he suffered any prejudice from the venire selection in Calcasieu Parish. . . . Purposeful discrimination may not be assumed or merely asserted, it must be proved. A defendant who claims discrimination has the burden of establishing that such was the fact. The mere establishment of disparity between the number of Negroes on a venire list and the number of whites does not make a prima facie case of discrimination which must stand where not rebutted by the State.

State v. Rideau, 278 So. 2d 100, 103-04 (La. 1973) (*Rideau III*) (citations omitted).[6]

The federal habeas district court, in granting the Rule 9(a) dismissal, held that the State had made a "particularized" showing of prejudice by alleging that the venire identification card exhibits were missing and that Mr. Hillebrandt, the other

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6. *But see id.* at 107-08 (Barham, J. dissenting) ("It cannot be seriously contended that this defendant failed to make out a prima facie case of purposeful racial discrimination in the selection of the grand jury venire. He has established that only 5 per cent of the grand jury venire was black, while the population of Calcasieu Parish 21 years or older was 25 per cent black. That grand jury venire was selected, not at random, but with the commissioners' full knowledge of the race of each person selected. But here, as in *Alexander*, it is not necessary that we 'rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral.' " (citing *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Whitus v. Georgia*, 385 U.S. 545 (1967)).

jury commissioners, and the presiding judges were unavailable as witnesses. After citing these factors, the court stated:

> The big issue is whether or not the court believes that the defendants, the state of Louisiana, has made a particularized showing of prejudice. And I think they have. I think to have someone wait as long as Mr. Rideau has waited, and we are now approaching the year 2000, and this crime occurred in 1961, with the final judgment in this case being in 1973, the court finds that this is a totally unreasonable time as a matter of law for the defendant to wait to raise this issue[.]

Hence, the federal district court did not make specific findings as to the particular ways in which the State had been prejudiced in its ability to respond to the petition by the unavailability of the witnesses or the venire identification card exhibits.

C.

It is apparent that the State failed to meet its heavy burden of (1) making a particularized showing that it has been prejudiced in its ability to respond to the petition; or, (2) assuming arguendo that prejudice exists, showing that that prejudice was caused by Rideau's having filed a delayed petition. Therefore, we need not reach (3) the issue of whether the petitioner has not acted with reasonable diligence as a matter of law.

Appendix A

(1)

The State claims that it has been prejudiced in its ability to respond to the petition because Acton Hillebrandt, the other members of the jury commission, and the two state trial judges are either too elderly to recall specific details, deceased, or are at unknown locations. To meet its burden of making a particularized showing of prejudice, however, the State may not merely allege prejudicial facts, but must offer concrete proof of the allegations. *Wise*, 952 F.2d at 223; *accord Marks*, 691 F.2d at 732, 734; *Paprskar v. Estelle*, 612 F.2d 1003, 1008 (5th Cir. 1980); *see also Jackson v. Estelle*, 570 F.2d 546, 547 (5th Cir. 1978) ("[P]roblems of proof attendant to claims regarding events which occurred over 30 years ago . . . 'alone [are] no bar to federal habeas relief' " (quoting *Hamilton v. Watkins*, 436 F.2d 1323, 1326 (5th Cir. 1970))); *Hudson v. Alabama*, 493 F.2d 171, 173 (5th Cir. 1974) (holding that there is no prejudice if crucial facts are not in doubt); *see generally*, LIEBMAN & HERTZ, supra, § 24.3 at 927 n.3 (citing and quoting foregoing authorities).

The State alleged but did not present concrete proof that Mr. Hillebrandt was physically or mentally unable to testify regarding the Calcasieu Parish grand jury selection procedures. Further, the State has not alleged the factual substance of such testimony by Mr. Hillebrandt or even alleged that it would differ from the transcripts of his testimony at the two state court evidentiary hearings. *See Walters*, 21 F.3d at 688 (noting that, "[i]f the state wishes to establish prejudice from the death of the court reporter and the unavailability of the court reporter's records, it must

also establish that the substance of those records is unavailable from other sources. This the state has not done."); *McDonnell*, 666 F.2d at 253 ("[P]rejudice resulting from the judge's death occurs only if there are no other sources from which the state can obtain the requisite information to counter the petitioner's claim.").

At the evidentiary hearing in the federal district court in the present case, the parties stipulated that four of the jury commissioners and one of the state court judges were deceased as of January 1999. However, the State has not alleged or proved with concrete evidence the date upon which each of the witnesses died or became unavailable, the date upon which Rideau's delay became unreasonable, or the substance of each witness's testimony that has been lost during the specific period of Rideau's allegedly unreasonable delay. *See, e.g.*, *McDonnell*, 666 F.2d at 253-54 (finding that prejudice had not been established because the State had not shown when records were destroyed during the course of delay and whether an earlier filing would have made a fuller response possible); *see also Lonchar v. Thomas*, 517 U.S. 314, 327 (1996) ("[H]istory of the Rule [9(a)] makes plain that the prejudice requirement represents a critical element in the balancing of interests undertaken by Congress and the framers of the Rule which courts may not undermine through the exercise of background equitable powers."); *Prejean v. Smith*, 889 F.2d 1391, 1405 (5th Cir. 1989) ("This circuit has held that no matter how long the delay may be, a particularized showing of prejudice is required.").

The State also argues that it has been prejudiced by the disappearance from the state trial records of the race-coded identification cards and other documentary exhibits.

However, the State does not make any particularized showing of prejudice from this disappearance. Furthermore, Mr. Hillebrandt described the identification cards fully in his testimony at the two state evidentiary hearings, and the transcripts of that testimony have been fully preserved, making the availability of the cards themselves unnecessary in these proceedings. *See Walters*, 21 F.3d at 688; *McDonnell*, 666 F.2d at 253.

(2)

Assuming arguendo that the death, disability, or unavailability of each witness is construed as prejudicial to the State, the State bears the further burden of proving that Rideau's delay in filing his habeas petition caused all sources of the evidence each could have provided to be lost. At a minimum, this requires the State to establish that if Rideau had filed his habeas petition at a specific earlier time, the evidence the State claims to have lost would have been available and material. The witnesses may have died or become unavailable before or shortly after Rideau's conviction and sentence became final in the Louisiana Supreme Court. In that case, the loss of the witnesses' testimony certainly would not be attributable to Rideau's delay in bringing his habeas petition. Moreover, the State apparently failed to take advantage of opportunities during the two state evidentiary hearings to present the testimony of the jury commissioners it now claims are deceased or unavailable. The State has not alleged or proved any facts to show that the loss of those witnesses is not attributable to its own lack of diligence. We simply do not have the necessary facts before us. The State has the burden to prove those facts; the absence of their proof compels the conclusion that the

necessary foundation for a Rule 9(a) dismissal has not been laid. *See Walters*, 21 F.3d at 688-89 (citing and quoting *Lawrence*, 837 F.2d at 1575 (11th Cir. 1988)) ("The district court needs to determine when the prejudicial deaths occurred and any other circumstances that would show that [the State] would have been in a position to show the facts surrounding [petitioner's] conviction had he only brought his claim earlier." (footnote omitted)); *McDonnell*, 666 F.2d at 249 (noting as dispositive the State's failure to show when the records were destroyed and, consequently, that petitioner's delay caused prejudice); *Marks*, 691 F.2d at 733 ("[T]he state's Rule 9(a) motion is meritorious only if it suffered some prejudice after the lapse of a reasonable amount of time for Marks to learn of [the *Argersinger*] decision and act.").

(3)

Because we hold that the State has failed to make a sufficient showing of prejudice in its ability to respond to the petition that was caused by the petitioner's delay, it is unnecessary for us to determine whether Rideau's delay in filing his petition was unreasonable. *Walters*, 21 F.3d at 686-87; *see also Strahan*, 750 F.2d at 441, 443; *McDonnell*, 666 F.2d at 251; *Bouchillon v. Estelle*, 628 F.2d 926, 929 (5th Cir. 1980); *Smith*, 910 F.2d at 1492; *see generally* LIEBMAN & HERTZ § 24.3, at 926 n.1 (citing and quoting from foregoing cases).[7]

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7. Although we do not decide the issue of the reasonableness of Rideau's delay, the author of this opinion certifies that his careful examination of the record reveals no evidence that supports the State's assertion of purposeful delay for tactical advantage by the petitioner.

Appendix A

III.

Because the State failed to carry its burden under Rule 9(a), we turn to a review of the decisions of the state courts and the federal district court on the merits of Rideau's petition for habeas corpus. In a federal habeas corpus proceeding, we review the district court's legal determinations de novo. *Johnson v. Puckett*, 929 F.2d 1067, 1070 (5th Cir. 1991). We review state court rulings of law or mixed rulings of law and fact de novo in habeas proceedings. *Id.* at 1072 (citing *Sumner v. Mata*, 455 U.S. 591, 597 (1982)). In habeas proceedings under the pre-AEDPA 28 U.S.C. § 2254, we accord a rebuttable presumption of correctness to written state court findings of fact. 28 U.S.C. § 2254(d) (1994); *Sumner*, 455 U.S. at 592.

In the present case, the State did not introduce any evidence in either the federal or the state courts to rebut the evidence taken in the state trial court hearings on Rideau's motions to quash the Calcasieu Parish grand jury indictment. As a consequence, the federal district court and the state courts were not required to make any purely factual determinations that we are called upon to review. Rather, we review their decisions only for error in rulings of law or mixed rulings of fact and law.

A.

For well over a century, the Supreme Court has held that a criminal conviction of an African-American cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury

from which African-Americans were excluded on the basis of race. *See Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972); *Bush v. Kentucky*, 107 U.S. 110, 119 (1883); *Neal v. Delaware*, 103 U.S. 370, 394 (1881); *see also Castaneda v. Partida*, 430 U.S. 482, 492-95 & n.12 (1977). Recently the Supreme Court reaffirmed this principle in holding that a white criminal defendant has the requisite standing to raise equal protection and due process objections to discrimination against black persons in the selection of grand juries. *Campbell v. Louisiana*, 523 U.S. 392, 397-401 (1998). "Regardless of his or her skin color, the accused suffers a significant injury in fact when the composition of the grand jury is tainted by racial discrimination. '[D]iscrimination on the basis of race in the selection of members of a grand jury . . . strikes at the fundamental values of our judicial system' because the grand jury is a central component of the criminal justice process." *Campbell*, 523 U.S. at 398 (1998) (quoting *Rose*, 443 U.S. at 556).

A criminal defendant "is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." *Alexander*, 405 U.S. at 628-29. Accordingly, where sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, the Supreme Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed. *See, e.g., Hill v. Texas*, 316 U.S. 400, 406 (1942). In *Castaneda*, the Court noted that among the cases in which the Court had applied this principle in circumstances involving grand jury discrimination

were *Alexander*, *supra*; *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks*, *supra*; *Reece v. Georgia*, 350 U.S. 85 (1955); *Cassell v. Texas*, 339 U.S. 282 (1950); *Hill*, *supra*; *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Rogers v. Alabama*, 192 U.S. 226 (1904); *Carter v. Texas*, 177 U.S. 442 (1900); and *Bush v. Kentucky*, *supra*. 430 U.S. at 492 n.12.

These holdings make clear that claims of discrimination in the selection of members of the grand jury are cognizable on federal habeas corpus, and will support issuance of a writ setting aside a state conviction and ordering the indictment quashed. *Rose*, 443 U.S. at 564-65. Nevertheless, to be entitled to habeas relief a claimant is required to prove discrimination under the standards set out in the Supreme Court's cases. *Id.* That is, "in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda*, 430 U.S. at 494. Specifically, Rideau was required to prove his prima facie case with regard to selection of the grand jury as follows:

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of under-representation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. This method of proof,

> sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class. Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Id. at 494-95 (citations and footnote omitted).

The petitioner may also prove a prima facie case without showing a statistical disparity "over a significant period of time"; he may satisfy his prima facie burden by showing a disparity in the particular grand jury body that indicted him, coupled with proof either that (1) the selection process was itself not racially neutral and presented an opportunity for discrimination, or that (2) the jury commissioners had made no attempt to acquaint themselves with eligible members of the African-American community. *Id.* at 493-94 (quoting *Washington v. Davis*, 426 U.S. 229, 241 (1976) ("A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community . . . or with racially non-neutral selection procedures.")); *cf. Batson v. Kentucky*, 476 U.S. 79, 94-95 (1986) (regarding the selection of petit jury venires, holding that, "[s]ince the ultimate issue is whether the State has discriminated in selecting the

defendant's venire, however, the defendant may establish a prima facie case in other ways than by evidence of long-continued unexplained absence of members of his race from many panels. In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing the opportunity for discrimination. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse." (internal quotations and citations omitted)).

Because racial discrimination in the grand jury selection process "strikes at the fundamental values of our judicial system and our society as a whole," it is well-established that a criminal defendant has suffered an equal protection violation when he is indicted by a grand jury that is the product of such a discriminatory process. *Rose*, 443 U.S. at 556 (citing *Neal*, 103 U.S. at 394; *Reece*, 350 U.S. at 87). "Since the beginning," the United States Supreme Court has "reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage." *Id.* at 556-57 (citing *Neal*, 103 U.S. at 394; *Bush*, 107 U.S. at 119; *Virginia v. Rives*, 100 U.S. 313, 322 (1879)).

> [N]o state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress

> passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. It is the state's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the state's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all — the least deserving as well as the most virtuous.

Hill, 316 U.S. at 406 (citations omitted).

B.

The ultimate question in the present case, whether the grand jury was selected in a systematically unrepresentative or racially discriminatory manner, has long been recognized to be a question of law or a mixed question of fact and law.

See, e.g., *Rose*, 443 U.S. at 561-62; *Whitus*, 385 U.S. at 550; *Hill*, 316 U.S. at 406; *Cassell*, 339 U.S. at 291-92 (Frankfurter, J., concurring).[8]

Rideau, as an African-American, is a member of a distinct, cognizable class that has been singled out for discrimination. *Rose*, 443 U.S. at 555-56. Rideau has also made a showing that the grand jury venire in his case was disparate in its representation of African-Americans in comparison to the proportion of African-Americans in the community. The 1960 Census figures for Calcasieu Parish indicate that 18.5% of the parish's male population over the age of 21 was African-American. F.H.P., at 167-69. An affidavit by the Calcasieu Parish registrar of voters shows that 16-2/3% of the registered voters in Calcasieu Parish was African-American. S.J.T. III. Nevertheless, only one member, or 5%, of the twenty-person grand jury venire was African-American, a mathematical disparity similar to those that the Supreme Court has found to establish a presumption of discrimination. *See Castaneda*, 430 U.S. at 495-96 (finding a presumption of discrimination where 79.1% of county's population was Mexican-American but only 39% of people summoned to grand jury service were Mexican-American) (citing *Whitus*, 385 U.S. at 550 (27.1%-to-9.1%

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8. *Cf. Johnson*, 929 F.2d at 1072 (finding question of whether discriminatory selection of grand jury foremen had occurred over a significant period of time to be mixed question of fact and law implicating no deference to state court's conclusion); *see also Brantley v. McKaskle*, 722 F.2d 187, 189 (5th Cir. 1984) ("If, however, the challenge goes to the inferences drawn from the facts, the reviewing court need not accept the [state court's] conclusion and may independently examine and weigh the facts."); *see generally* 1 LIEBMAN & HERTZ § 20.3d at 767-94 and n.56.

disparity); *Sims v. Georgia*, 389 U.S. 404 (1967) (24.4%-to-4.7% disparity); *Jones v. Georgia*, 389 U.S. 24 (1967) (19.7%-to-5% disparity)). This 18.5%-to-5% disparity between the distinct group's presence in the community population and its representation on the grand jury venire in Rideau's case might, standing alone, support a presumption of discrimination. We need not decide that, however. The Supreme Court has stressed that it

> has never announced mathematical standards for the demonstration of "systematic exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors." The progressive decimation of potential Negro grand jurors is indeed striking here, but we do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral.

Alexander, 405 U.S. at 630. Here, as well, additional factors supplement the statistical disparity. For example, Mr. Hillebrandt testified that neither he nor any of the other commissioners, to his knowledge, had made any attempt to identify and call upon eligible African-Americans for potential selection as general or grand jury venire persons. *Washington*, 426 U.S. at 241 (holding that a presumption of prejudice is shown when the disparity on a particular grand jury venire panel is "combined with the failure of the jury commissioners to be informed of eligible" African-Americans in the community); *Smith v. Texas*, 311 U.S. 128, 132 (1940) ("Where jury commissioners limit those from

whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who knew no negroes as well as from commissioners who know but eliminate them."); *Scott v. Walker*, 358 F.2d 561, 573-74 (5th Cir. 1966) (en banc) ("It is plain from the record here that the commissioners put on the list only those personally known to them. They made no especial effort to ascertain whether there were qualified Negroes in the parish for jury service. In failing to do so they violated the rule announced by the Supreme Court . . . in *Cassell v. State of Texas*, where it was said, 'When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination.' " (quoting 339 U.S. at 289)).

Also, it is evident that the degree of underrepresentation of African-Americans on the general and grand jury venires had prevailed over a significant period of time. According to Mr. Hillebrandt, who had attended virtually all of the meetings of the jury commission since his election in 1948, the commission's venire selection practices and procedures were of long standing and long vintage in Calcasieu Parish. Many years before 1961, Mr. Hillebrandt testified, after a jury conviction had been reversed, he began the practice of making sure that there was at least one "colored person" on each grand jury venire.[9] This practice, however, he clearly

9. As the Magistrate Judge's report in these proceedings observes, "It is difficult, if not impossible, to interpret this statement, when read in context with the other facts, as anything other than an admission that jury commissioners were trying to get away with putting as few blacks on grand juries as they thought they could."

indicated, was merely a token inclusion of African-Americans and was by no means intended to rectify their underrepresentation.

Rideau introduced additional census and venire composition evidence in the proceedings before the Magistrate Judge that fully corroborates the Calcasieu Parish jury commission's long-lived pattern of discrimination against African-Americans in the selection of general and grand jury venires. As the Magistrate Judge's report correctly found:

> The statistical evidence of under-representation is overwhelming and unrebutted. According to the 1960 U.S. Census, Calcasieu Parish had 7,237 black men over the age of 21, and 31,729 white men in the same category. Thus, about 18.5 percent of the parish's population was black and eligible for grand jury service in 1960 and 1961. According to the 1950 U.S. Census, Calcasieu Parish had 26,172 men over the age of 21. Of that number, 5,626 were black — about 21.5 percent of the eligible population.
>
> According to undisputed evidence of the 12 grand juries that were selected between October 3, 1954 and January 16, 1961, no grand jury had more than one black member (out of 12 on each panel). Of 144 grand jurors that were selected during this period, only six were black — about four percent.

F.H.P., at 190-91 (footnote omitted). Consequently, under either standard, disproportionate underrepresentation over a significant period of time, or disproportionate under-representation of African-Americans in Rideau's own grand jury venire coupled with a racially non-neutral selection process and the failure of the jury commissioners to acquaint themselves with a representative number of African-Americans eligible for jury service, we conclude that Rideau proved a prima facie case of unconstitutional grand jury venire selection and composition.

A telling sign that the prevalent statistical underrepresentation of minorities on the grand jury venires resulted from racial discrimination was the commission's venire selection procedure, which was "susceptible of abuse or [was] not racially neutral." *Castaneda*, 430 U.S. at 494. According to Mr. Hillebrandt's testimony, as supported by the general venire identification cards introduced at the two state evidentiary hearings, and not disputed here, each potential grand jury venire member's identification information was entered onto a card that also indicated the race of each person. S.J.T. III, at 128. In cases in which the jury commissioners have had access to the racial identity of potential grand jurors while engaged in the selection process, the Supreme Court has repeatedly found that the procedure constituted a system impermissibly susceptible to abuse and racial discrimination. *Castaneda*, 430 U.S. at 495 (finding that the non-random selection of names of grand jurors was susceptible to abuse because Mexican-Americans were easily identifiable by their Spanish surnames); *Alexander*, 405 U.S. at 630 ("[W]e do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial

discrimination on statistical improbability alone, for the selection procedures themselves are not racially neutral. The racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination."); *Whitus*, 385 U.S. at 548-49 (finding a selection system was susceptible to abuse where potential grand jurors were selected from segregated tax digest lists, which also coded African-Americans with a "(c)" behind each name); *cf. Avery v. Georgia*, 345 U.S. 559, 562 (1953) (finding that the practice of placing potential petit jurors' identification on yellow cards if they were African-American and on white cards if they were white "[o]bviously . . . makes it easier for those to discriminate who are of a mind to discriminate." (quoted approvingly in *Alexander*, 405 U.S. at 631)).

That Mr. Hillebrandt testified that he did not intentionally seek to discriminate against prospective grand jurors by using cards bearing racial identifications, and that he did not know whether the other jury commissioners did so, does not dissipate a prima facie case established under the Court's decisions. *Norris v. Alabama*, 294 U.S. 587, 598 (1935) ("If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the [Equal Protection Clause] would be but a vain and illusory requirement."); *see also Alexander*, 405 U.S. at 630 (finding the racial identification in the selection process impermissible "although there is no evidence that the commissioners consciously selected by race"); *Whitus*, 385 U.S. at 551 ("While the commissioners testified that no one

was included or rejected on the jury list because of race or color this has been held insufficient to overcome prima facie evidence."); *Eubanks*, 356 U.S. at 587 (quoting above passage from *Norris*); *Reece*, 350 U.S. at 88 ("[M]ere assertions of public officials that there has not been discrimination will not suffice."). The Supreme Court has spoken to this point in words that are equally applicable to the present case:

> As in *Whitus v. Georgia*, *supra*, the clerk of court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure. The Court has squarely held, however, that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. . . .The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.

Alexander, 405 U.S. at 632 (internal quotations and citations omitted).

Consequently, we conclude that Rideau established a prima facie case of racial discrimination in the process used to select the grand jury that indicted him. The State produced no evidence to rebut any portion of Rideau's prima facie case in either the two state evidentiary hearings or the federal district court proceedings. The only evidence the State can point to is Mr. Hillebrandt's testimony that neither he nor any other commissioner to his knowledge used the race-

coded identification cards to intentionally exclude African-Americans from grand jury venires. As we have noted, however, such disclaimers are insufficient to rebut a prima facie showing of discrimination. The State must "show[ ] that permissible racially neutral selection criteria and procedures have produced the monochromatic result," and it has made no strides in making such a showing, either here or in the state courts. *Alexander*, 405 U.S. at 632.

Accordingly, Rideau's conviction must be reversed and his unconstitutionally obtained indictment quashed. *Vasquez*, 474 U.S. at 264 ("The overriding imperative to eliminate this systematic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.").

> [I]ntentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent. Thus, the remedy we have embraced for over a century — the only effective remedy for this violation — is not disproportionate to the evil that it seeks to deter. If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it.

Id. at 262. However, as the Supreme Court noted in *Hill*, "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for [the State] may indict him and try him again by the procedure which conforms to

the constitutional requirements." 316 U.S. at 406. Consequently, the State of Louisiana is free to seek another indictment and retrial of Rideau in accordance with the Constitution, the laws, and this opinion.

For the foregoing reasons, we REVERSE and REMAND to the district court with instructions to issue the writ of habeas corpus unless, within a reasonable time to be designated by the district court, the State should again indict and try Rideau.

APPENDIX B — EXCERPTS FROM TRANSCRIPT OF EVIDENTIARY HEARING OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DENYING WRIT OF HABEAS CORPUS DATED MAY 5, 1999 AND FILED JUNE 22, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER 94-952-B-M2

WILBERT RIDEAU

VERSUS

JOHN P. WHITLEY, ET AL

MAY 5, 1999

HON. FRANK J. POLOZOLA

TRANSCRIPT OF THE EVIDENTIARY HEARING IN THE ABOVE ENTITLED AND NUMBERED CASE.

* * *

[142] * * *

(COURT'S RULING)

THE COURT: THIS MATTER IS BEFORE THE COURT ON AN APPLICATION FOR WRIT OF HABEAS CORPUS FILED BY WILBERT RIDEAU. BASICALLY,

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THE APPLICATION CHALLENGES THE MANNER IN WHICH THE GRAND JURY WAS SELECTED WHICH INDICTED MR. RIDEAU IN 1961 IN CONNECTION WITH A MURDER WHICH OCCURRED IN CALCASIEU PARISH.

THE GENERAL HISTORY OF THIS CASE HAS BEEN REPEATED IN NUMEROUS DECISIONS RENDERED BY VARIOUS COURTS, INCLUDING THE LOUISIANA SUPREME COURT, AS WELL AS THE UNITED STATES SUPREME COURT, AND NEED NOT BE REPEATED IN DETAIL HERE. HOWEVER, THE HISTORY OF THE CASE, INSOFAR AS THE CURRENT ISSUES ARE CONCERNED, ARE IMPORTANT AND THE COURT BELIEVES IT IS IMPORTANT TO TAKE A FEW MINUTES TO SET FORTH THESE PARTICULAR FINDINGS.

THE CRIME IN THIS CASE OCCURRED ON FEBRUARY 16TH, 1961. A GRAND JURY WHICH ULTIMATELY INDICTED MR. RIDEAU HAD BEEN SELECTED PRIOR TO THE TIME THAT THE CRIME OCCURRED.

THE EVIDENCE REFLECTS THAT THE GRAND JURY WAS [143] EMPANELED ON FEBRUARY 8TH, 1961, SOME EIGHT DAYS PRIOR TO THE TIME THAT THE CRIME FOR WHICH MR. RIDEAU WAS ULTIMATELY INDICTED WAS COMMITTED.

THE FIRST GRAND JURY HEARING IN THIS CASE OCCURRED ON FEBRUARY, EXCUSE ME, ON NOVEMBER 5TH, 1964, IN CONNECTION WITH SOME STATE COURT MATTERS.

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THE CASE HAS BEEN UP AND DOWN THE STATE AND FEDERAL COURTS FOR SOME TIME. THE FIRST LOUISIANA SUPREME COURT OPINION WAS 137 SO.2D 283, IN 1962. THE FIRST UNITED STATES SUPREME COURT APPEAL WAS RENDERED IN 1963, REPORTED AT 83 S.CT. 1417.

THE FIRST OBJECTION TO THE GRAND JURY WAS MADE BY MR. RIDEAU AND HIS ATTORNEYS AFTER THE FIRST TRIAL AND BEFORE THE SECOND TRIAL. THERE WAS A MOTION TO QUASH.

AS I SAID EARLIER, THE HEARING OCCURRED ON NOVEMBER 5TH, 1964. THE TRIAL COURT DENIED THE ISSUE. THE LOUISIANA SUPREME COURT SPECIFICALLY REVIEWED THE ISSUE AND FOUND NO VIOLATIONS IN ITS OPINION WHICH WAS RENDERED IN 1967 AND REPORTED AT 193 SO.2D 264.

THEREAFTER, THE MATTER CAME TO THE FEDERAL COURT IN 1967. THE EASTERN DISTRICT OF LOUISIANA, WHICH BATON ROUGE WAS THEN PART OF AS THE BATON ROUGE DIVISION, GRANTED MR. RIDEAU'S APPLICATION FOR WRIT OF HABEAS CORPUS ON THE WITHERSPOON ISSUE AND NOT THE ISSUE INVOLVED IN THIS PARTICULAR CASE ON DECEMBER 8TH, 1967.

[144] IT MUST BE NOTED THAT MR. RIDEAU DID, IN FACT, RAISE THE ISSUE OF THE IMPROPER SELECTION OF THE GRAND JURY BECAUSE OF THE

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EXCLUSION OF BLACKS IN HIS APPLICATION FOR WRIT OF HABEAS CORPUS FILED IN FEDERAL COURT IN THE 1960'S.

THE THIRD TRIAL OCCURRED ON DECEMBER 1ST, 1969. MR. RIDEAU FILED A MOTION TO QUASH. THE ISSUE OF GRAND JURY WAS RAISED AGAIN.

THE LOUISIANA SUPREME COURT, IN REVIEWING MR. RIDEAU'S CONVICTION IN 1973, AGAIN CONSIDERED THE EVIDENCE PRESENTED, MADE FACTUAL FINDINGS, FOUND NO DISCRIMINATION, AND AFFIRMED MR. RIDEAU'S CONVICTION AT 278 SO.2D 100.

THE COURT ALSO NOTES THAT ON ONE OF THE APPLICATIONS THAT MR. RIDEAU FILED WITH THE UNITED STATES SUPREME COURT THE ISSUE WAS RAISED BUT NOT CONSIDERED BY THE UNITED STATES SUPREME COURT.

THERE ARE SEVERAL ISSUES INVOLVED IN THE CASE AS THE COURT HAS NOTED DURING THE ORAL ARGUMENT AND THE HEARING CONDUCTED BY THE COURT.

THIS MATTER WAS INITIALLY REFERRED TO THE UNITED STATES MAGISTRATE JUDGE. THE MAGISTRATE JUDGE RENDERED HER OPINION RECOMMENDING THAT THE APPLICATION FOR WRIT OF HABEAS CORPUS BE GRANTED BECAUSE OF THE IMPROPER SELECTION OF THE GRAND JURY.

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THE STATE OF LOUISIANA FILED A TIMELY OBJECTION. THE [145] MATTER CAME BEFORE THIS COURT. THIS COURT HAS CONDUCTED ORAL ARGUMENT, HELD CONFERENCES, CONDUCTED AN EVIDENTIARY HEARING TODAY, AND IS NOW PREPARED TO RENDER ITS DECISION.

THE BASIC ISSUES BEFORE THE COURT, INSOFAR AS THE PLAINTIFF IS CONCERNED, IS WHETHER OR NOT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE BLACKS WERE DISCRIMINATED AGAINST IN THE SELECTION OF THE GRAND JURY WHICH INDICTED HIM IN CALCASIEU PARISH.

IN RESPONSE TO THIS APPLICATION, THE STATE OF LOUISIANA ALLEGES SEVERAL DEFENSES: (1) THAT THE APPLICATION FOR WRIT OF HABEAS CORPUS IS NOT TIMELY AND SHOULD BE DISMISSED BECAUSE OF THE PREJUDICE THAT IT HAS SUSTAINED UNDER RULE 9(A) OF THE RULES OF HABEAS CORPUS, SECTION 2254 CASES — EXCUSE ME, RULE 9(A) RULES OF SECTION 2254 CASES SET FORTH IN 28 USC.

IN ADDITION, THE STATE OF LOUISIANA ALSO ARGUES THAT EVEN IF THE APPLICATION IS TIMELY THE LOUISIANA SUPREME COURT OPINION SHOULD BE UPHELD INSOFAR AS THE FACTUAL FINDINGS MADE IN THE DECISION RENDERED BY THAT COURT.

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IN REVIEWING THIS MATTER, IT APPEARS TO THE COURT THAT THE COURT MUST FIRST DECIDE WHETHER OR NOT RULE 9(A) BARS THE SUIT.

IF THE COURT FINDS THAT 9(A) DOES, IN FACT, BAR MR. RIDEAU'S CASE, THE COURT MUST THEN DECIDE, IN ITS DISCRETION, WHETHER OR NOT TO SUSTAIN THE STATE'S MOTION [146] OR, IF THERE IS EVIDENCE OF ACTUAL INNOCENCE, IN THE COURSE OF THE COURT'S DISCRETION, TO DENY THE DEFENSE AND ALLOW MR. RIDEAU TO PROCEED WITH A HEARING ON THE MERITS OF HIS CLAIM.

IF THERE IS EVIDENCE OF ACTUAL INNOCENCE, THE COURT CAN, IN FACT, REJECT THE DEFENSE AND PROCEED TO THE MERITS.

IF THE RULE 9(A) DOES NOT APPLY, THEN THE COURT MUST ALSO DECIDE THE MERITS OF THIS PARTICULAR CASE.

THERE IS ALSO A SECONDARY ISSUE INVOLVED IN THIS CASE, AND THAT IS WHETHER OR NOT THE COURT SHOULD ACCEPT THE PROFFER WHICH MR. RIDEAU HAS OFFERED. AND IN DECIDING WHETHER TO ACCEPT THIS PROFFER OF ADDITIONAL STATISTICS, WHICH INCIDENTALLY, WERE NOT PRESENTED TO THE LOUISIANA COURTS, EITHER THE STATE DISTRICT COURTS OR THE LOUISIANA SUPREME COURT, THE COURT HAS TO DECIDE WHETHER OR NOT THE STATE WOULD BE

PREJUDICED IN TRYING TO DEFEND ANY HEARING THAT THE COURT WOULD CONDUCT IF, IN FACT, THIS NEW EVIDENCE WAS CONSIDERED BY THE COURT.

AS I SAID EARLIER, THE FIRST ISSUE TO BE DETERMINED IS WHETHER OR NOT RULE 9 APPLIES. AND RULE 9 IN THE RULES FOR SECTION 2254 CASES PROVIDES AS FOLLOWS:

RULE 9(A) DELAYED PETITIONS. A PETITION MAY BE DISMISSED IF IT APPEARS THAT THE STATE OF WHICH THE RESPONDENT IS AN OFFICER HAS BEEN PREJUDICED IN ITS [147] ABILITY TO RESPOND TO THE PETITION BY DELAYING ITS FILING UNLESS THE PETITIONER SHOWS THAT IT IS BASED ON GROUNDS OF WHICH HE COULD NOT HAVE HAD KNOWLEDGE BY THE EXERCISE OF REASONABLE DILIGENCE BEFORE THE CIRCUMSTANCES PREJUDICIAL TO THE STATE OCCURRED.

RULE 9(B) DEALS WITH SUCCESSIVE PETITIONS, BUT I DON'T THINK THAT IS AN ISSUE IN THIS CASE, AND THE COURT WILL NOT CONSIDER ANY OR HAVE ANY DISCUSSION ON RULE 9(B).

UNDER RULE 9(A) OF THE RULES GOVERNING SECTION 2254 CASES, A HABEAS PETITION MAY BE DISMISSED IF IT APPEARS THAT THE STATE HAS BEEN PREJUDICED IN ITS ABILITY TO RESPOND TO THE PETITION BY DELAY IN ITS FILING UNLESS THE PETITIONER SHOWS THAT IT IS BASED ON

GROUNDS OF WHICH HE COULD NOT HAVE HAD KNOWLEDGE BY THE EXERCISE OF REASONABLE DILIGENCE BEFORE THE PREJUDICE SUSTAINED BY THE STATE. SUCH WAS THE HOLDING IN STRAHAN (S-T-R-A-H-A-N) VERSUS BLACKBURN, 750 F.2D 438, 5TH CIRCUIT, CERT. DENIED AT 471 US 1138, 105 S.CT. 2683, 86 L.ED.2D 700, 1985.

THE FIFTH CIRCUIT IN WALTERS VERSUS SCOTT, 21 F.3D 683, 5TH CIRCUIT 1994, SUMMARIZED THE STANDARDS APPLICABLE TO A CLAIM OF PREJUDICIAL DELAY UNDER RULE 9(A).

THE FIFTH CIRCUIT STATED, THE STATE BEARS A HEAVY BURDEN IN SEEKING A DISMISSAL UNDER RULE 9(A) OF SECTION 2254 RULES. RULE 9(A) CODIFIES THE EQUITABLE DOCTRINE OF LACHES AS APPLIED TO HABEAS CORPUS PETITIONS. THE [148] APPLICATION OF RULE 9(A) MUST BE CAREFULLY LIMITED TO AVOID ABROGATING THE PURPOSE OF THE WRIT OF HABEAS CORPUS. THE BURDEN IS ON THE STATE TO (1) MAKE A PARTICULARIZED SHOWING OF PREJUDICE; (2) SHOW THAT THE PREJUDICE WAS CAUSED BY THE PETITIONER HAVING FILED A LATE PETITION; AND (3) SHOW THAT THE PETITIONER HAS NOT ACTED WITH REASONABLE DILIGENCE AS A MATTER OF LAW. THE SHOWING OF PREJUDICE MUST BE BASED UPON THE SPECIFIC CHALLENGE RAISED IN THE PETITION. MERE PASSAGE OF TIME ALONE IS NEVER SUFFICIENT TO CONSTITUTE PREJUDICE. THE STATE MUST SHOW THAT IT HAS

BEEN PREJUDICED IN ITS ABILITY TO RESPOND TO THE ALLEGATIONS IN THE PETITIONER'S PETITION. IT IS IRRELEVANT THAT THE STATE HAS BEEN PREJUDICED IN ITS ABILITY TO SUCCESSFULLY CONVICT THE PETITIONER. AGAIN. THE PREJUDICE MUST HAVE BEEN CAUSED BY THE PETITIONER'S UNREASONABLE DELAY IN BRINGING THE PETITION. FINALLY, THE PETITIONER'S DELAY IN BRINGING THE PETITION MUST HAVE BEEN UNREASONABLE AS A MATTER OF LAW. IF THE STATE MAKES ITS SHOWING OF THESE ELEMENTS, THE BURDEN OF GOING FORWARD SHIFTS TO THE PETITIONER TO SHOW EITHER (1) THAT THE STATE ACTUALLY IS NOT PREJUDICED OR (2) THAT THE PETITIONER'S DELAY IS BASED ON GROUNDS OF WHICH HE COULD NOT HAVE HAD KNOWLEDGE BY THE EXERCISE OF REASONABLE DILIGENCE BEFORE THE CIRCUMSTANCES PREJUDICIAL TO THE STATE OCCURRED.

AND THIS QUOTE IS REFERENCED AT 21 F.3D 686 TO 687.

[149] THE FACTS IN THIS PARTICULAR CASE SHOW A NUMBER OF SPECIFIC FINDINGS. NUMBER ONE, THE ISSUE RAISED IN THE APPLICATION FOR WRIT OF HABEAS CORPUS HAS BEEN RAISED TIME AND TIME AGAIN BY THE DEFENDANT DURING THE COURSE OF HIS EARLIER APPEALS.

AS I NOTED EARLIER, THE MOTION TO QUASH WAS FIRST HEARD ON NOVEMBER 5TH, 1964. IT WAS

AGAIN RAISED IN THE THIRD TRIAL IN 1969. THE SUPREME COURT CONSIDERED THE MATTER IN ITS 1967 OPINION AND THE 1973 OPINION.

MR. RIDEAU ALSO RAISED IT IN AN APPLICATION FOR WRIT OF HABEAS CORPUS FILED WITH THIS COURT IN 1967 AND, INDEED, ALSO RAISED IT IN AN APPLICATION FOR A WRIT OF HABEAS CORPUS FILED WITH THE UNITED STATES SUPREME COURT IN ONE OF THE WRITS FILED BEFORE THAT PARTICULAR COURT.

AS I NOTED EARLIER, THIS CRIME OCCURRED IN 1961. THE INDICTMENT WAS RETURNED IN 1961. TRIALS HAVE OCCURRED IN THE EARLY 1960'S, BOTH, I THINK, IN 1962 OR 1961 WAS THE FIRST TRIAL. THE FIRST OPINION WAS IN 1962; THE SECOND TRIAL, 1967; THE THIRD TRIAL, 1973.

MR. RIDEAU ADMITTED ON THE STAND TODAY IN HIS TESTIMONY THAT HE WAS AWARE OF THESE PARTICULAR ISSUES DURING THE TIME THAT THEY WERE RAISED, AND MORE DISCUSSION ABOUT THIS WILL BE COMING AT A LATER TIME.

THE COURT, IN A STIPULATION FILED BY THE PARTIES, MUST TAKE NOTE OF THE FACT THAT A NUMBER OF PEOPLE [150] ASSOCIATED WITH THE MOTION ARE NO LONGER LIVING. INDEED, THE ONLY PERSON LIVING IS THE PERSON WHO TESTIFIED, MR. HILLEBRANDT, WHO IS NOW 80-PLUS YEARS OLD.

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THE OTHER JURY COMMISSIONERS WERE NOT CALLED TO TESTIFY. THERE IS NO TESTIMONY ASSOCIATED WITH THESE PARTICULAR INDIVIDUALS.

THE JUDGE WHO TRIED THE MOTION, AT LEAST JUDGE COVINGTON, AND I AM NOT SURE ABOUT THE NAME OF THE OTHER JUDGE, ALL THE JUDGES ARE NOW DECEASED. NO EVIDENCE EXISTS IN LAKE CHARLES ON THE ISSUE PRESENTED. NONE OF THE CARDS OR OTHER DOCUMENTARY EVIDENCE THAT WAS USED AT HEARING EXISTS.

THE BIG ISSUE IS WHETHER OR NOT THE COURT BELIEVES THAT THE DEFENDANTS, THE STATE OF LOUISIANA, HAS MADE A PARTICULARIZED SHOWING OF PREJUDICE. AND I THINK THEY HAVE.

I THINK TO HAVE SOMEONE WAIT AS LONG AS MR. RIDEAU HAS WAITED, AND WE ARE NOW APPROACHING THE YEAR 2000, AND THIS CRIME OCCURRED IN 1961, WITH THE FINAL JUDGMENT IN THIS CASE BEING IN 1973, THE COURT FINDS THAT THIS IS A TOTALLY UNREASONABLE TIME AS A MATTER OF LAW FOR THE DEFENDANT TO WAIT TO RAISE THIS ISSUE, PARTICULARLY UNDER THE FACTS OF THIS CASE WHERE THIS ISSUE HAS BEEN RAISED TIME AND TIME AGAIN ON BEHALF OF THE PETITIONER.

THE PETITIONER WAS AWARE OF THE FACT THAT IT WAS, IN [151] FACT, RAISED ON THESE

TIMES. AND THE LAW, IN FACT, HAS NOT CHANGED AT ALL INSOFAR AS THE LAW TO BE APPLIED BY THE COURTS IS CONCERNED.

THERE ARE THREE SEPARATE FINDINGS THAT THE COURT HAS TO MAKE: (1) THAT THERE WAS A PARTICULARIZED SHOWING OF PREJUDICE. THERE ARE NO LONGER ANY WITNESSES THAT COULD TESTIFY AS TO WHAT THEY DID OR DIDN'T DO IN THE SELECTION OF GRAND JURIES OR EVEN TO REBUT THE ADDITIONAL EVIDENCE THAT THE PETITIONER WISHES TO EVEN SUBMIT TO THE COURT TODAY. THE PREJUDICE WAS CAUSED BY THE PETITIONERS HAVING FILED A LATE PETITION. IT IS CLEAR THAT ALL OF THESE INDIVIDUALS WERE LIVING AT THE TIME THAT THE MOTION WAS FILED. ALL OF THESE INDIVIDUALS ARE NOW DECEASED. THE RECORD HAS BEEN DISMANTLED AND, INDEED, THE ENTIRE RECORD STILL HASN'T BEEN FOUND, EVEN THOSE PORTIONS OF THE RECORD THAT MIGHT HAVE SOMETHING TO DO WITH THE GUILT PHASE OF THE TRIAL. BUT THE RECORDS THAT SPECIFICALLY DEALT WITH THE MOTION TO QUASH HEARING, OTHER THAN THE TRANSCRIPT, ARE NO LONGER AVAILABLE. AND THE STATE HAS TO SHOW THAT THE PETITIONER HAS NOT ACTED WITH REASONABLE DILIGENCE AS A MATTER OF LAW.

I THINK THE EVIDENCE IN THIS CASE IS OVERWHELMING THAT TO WAIT AS LONG AS MR. RIDEAU WAITED, FROM 1973 TO 1994, 21 YEARS, TO

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FILE AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON AN ISSUE THAT HE WAS FULLY AWARE OF AND [152] HAD, IN FACT, BEEN RAISED IN FEDERAL COURT BY AN ATTORNEY WHO WAS REPRESENTING HIM IS SUCH THAT THE COURT MUST FIND THAT HE, MR. RIDEAU, HAS NOT ACTED WITH REASONABLE DILIGENCE AS A MATTER OF LAW.

THE PETITIONER NOW HAS TO COME FORWARD TO SHOW THAT THE STATE ACTUALLY IS NOT PREJUDICED, AND THAT EVIDENCE IS WOEFULLY LACKING IN THIS PARTICULAR CASE. INDEED, THERE IS NO EVIDENCE PRESENTED BY THE DEFENDANT WHICH WOULD SHOW THAT — WHEN I SAY DEFENDANT, MR. RIDEAU — THAT WOULD SHOW THAT THE STATE IS NOT PREJUDICED BY THE FACT THAT THESE WITNESSES ARE NOW DECEASED AND THE EVIDENCE IS NOT AVAILABLE.

FURTHERMORE, THE PETITIONER HAS FAILED TO SHOW THAT HIS DELAY IS BASED ON GROUNDS OF WHICH HE COULD NOT HAVE HAD KNOWLEDGE BY THE EXISTENCE OF REASONABLE DILIGENCE BEFORE THE CIRCUMSTANCES PREJUDICIAL TO THE STATE OCCURRED.

IN THIS PARTICULAR CASE, AS I SAID EARLIER, THERE WAS A 21-YEAR DELAY BETWEEN THE LAST TIME THAT MR. RIDEAU APPEARED IN THE COURT AND THE APPLICATION FOR WRIT OF HABEAS CORPUS FILED ON THIS PARTICULAR ISSUE. THE

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SAME ISSUE RAISED TODAY WAS RAISED IN — JUDGE WEST INITIALLY CONSIDERED THIS CASE IN 1967. THE SAME ISSUE RAISED TODAY WAS ALSO RAISED BY MR. RIDEAU IN HIS STATE COURT PETITIONS AFTER TRIALS TWO AND THREE.

[153] HAVING CONCLUDED THIS, THE COURT FINDS THAT MR. RIDEAU IS BARRED UNDER RULE 9(A) OF THE FEDERAL RULES GOVERNING SECTION 2250 CASES FROM PROCEEDING IN THIS CASE.

AS I NOTED EARLIER, THIS IS A FACT INTENSIVE MOTION. THE COURT HAS DISCRETION. AND ONE OF THE THINGS THAT I HAVE ALWAYS DONE IN OPINIONS WRITTEN BY THIS COURT, THE COURT ALWAYS REFERS TO THE ISSUE OF ACTUAL INNOCENCE, NAMELY, THAT IF THERE IS ANY EVIDENCE AT ALL IN THE RECORD THAT WOULD IN ANY WAY SUGGEST THAT THE DEFENDANT IS INNOCENT OF THE CRIME, THE COURT WILL EXERCISE ITS DISCRETION IN DETERMINING WHETHER OR NOT AN EQUITABLE DEFENSE SUCH AS A RULE 9(A) DEFENSE SHOULD, IN FACT, BE IMPOSED TO BAR PETITIONER FROM HAVING HIS MATTER CONSIDERED BY THE COURT.

THERE IS ABSOLUTELY NO EVIDENCE, NO EVIDENCE OF ANY KIND PRESENTED BY MR. RIDEAU OR HIS ATTORNEY THAT WOULD IN ANY WAY SUGGEST THAT THERE IS AN ISSUE OF ACTUAL INNOCENCE INVOLVED IN THIS PARTICULAR CASE.

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THE ISSUE OF ACTUAL INNOCENCE ONLY — AND I WANT THIS RECORD TO BE VERY CLEAR — THE ISSUE OF ACTUAL INNOCENCE IS ONLY BEING BROUGHT UP BY THE COURT BECAUSE IT ONLY GOES TO THE ISSUE, IT ONLY GOES TO THE ISSUE OF WHETHER OR NOT THIS COURT SHOULD EXERCISE ITS DISCRETION IN DENYING THE STATE'S RULE 9(A) MOTION WHICH WOULD BAR MR. RIDEAU FROM HAVING HIS MATTER CONSIDERED BY THE COURT. IT HAS NOTHING [154] TO DO WITH THE ISSUE ON THE MERITS, THAT IS, WHETHER OR NOT THE STATE COULD PROPERLY TRY THIS DEFENDANT AGAIN OR CAN'T TRY THIS DEFENDANT AGAIN IF THERE WAS AN IMPROPER SELECTION OF THE GRAND JURY.

THE COURT DOES NOT BELIEVE THAT THE ISSUE SHOULD STOP HERE. AS I SAID EARLIER, EVEN THOUGH THE COURT HAS FOUND THAT THE DEFENDANT, MR. RIDEAU, HAS FAILED TO SHOW ANY ACTUAL INNOCENCE THAT WOULD SUGGEST TO THE COURT THAT IT SHOULD NOT APPLY THE PROVISIONS OF RULE 9(A), THE COURT BELIEVES THAT IT SHOULD DECIDE THE ISSUE AND THE MERITS — ON THE MERITS IN THE ALTERNATIVE JUST TO AVOID FURTHER APPEALS AND FURTHER DELAY IN A CASE THAT HAS BEEN PENDING BEFORE THE COURTS TOO LONG ANYHOW, AND THAT IS, THE COURT SHOULD GO AHEAD AND DECIDE THE ISSUE ON THE MERITS WHETHER OR NOT THERE HAS BEEN AN IMPROPER SELECTION OF THE GRAND JURY WHICH INDICTED THE DEFENDANT IN THIS PARTICULAR CASE.

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ON THE ISSUE OF ACTUAL INNOCENCE, THE COURT HAS TO, HAS TO NOTE THAT IN ALL THE APPEALS TAKEN BY MR. RIDEAU BEFORE ALL THE JUDGES AND JUSTICES BOTH ON THE STATE AND FEDERAL LEVEL THAT HAVE REVIEWED THIS CASE NOT A SINGLE JUDGE OR JUSTICE, OR EVEN THE DEFENDANT, HAS CHALLENGED HIS GUILT.

THE ISSUES ON NUMEROUS OCCASIONS HAVE BEEN PROCEDURAL ON WHETHER OR NOT THE DEATH PENALTY SHOULD HAVE BEEN IMPOSED, OR WHETHER OR NOT THE CASE SHOULD OR SHOULD NOT [155] HAVE BEEN TRIED IN A PARTICULAR PARISH.

BUT THE RECORD IN THIS CASE SHOWS OVERWHELMINGLY BEYOND A REASONABLE DOUBT THAT MR. RIDEAU IS, IN FACT, GUILTY OF THE CRIME FOR WHICH HE WAS CONVICTED AND IS GUILTY BEYOND A REASONABLE DOUBT.

THE FINDING THAT THE COURT MADE TODAY, INSOFAR AS THE APPLICATION OF RULE 9(A), IS SIMILAR TO A RULING MADE BY THE COURT IN DIXON VERSUS CAIN, CIVIL ACTION NUMBER 97153 ON THE DOCKET OF THE COURT WHICH WAS RENDERED BY THE COURT IN 1998 WHEREIN THE COURT ADOPTED THEN MAGISTRATE JUDGE NOLAND'S OPINION THAT THE STATE'S MOTION TO DISMISS UNDER RULE 9(A) BE GRANTED IN A CASE WHERE THERE WAS A 23-YEAR DELAY IN FILING THE APPLICATION FOR WRIT OF HABEAS CORPUS

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IN CONNECTION WITH A 1974 CONVICTION FOR SECOND DEGREE MURDER, AND THE COURT FOUND THAT RULE 9(A) APPLIED.

IN THE ONE CASE THAT MR. RIDEAU REFERS TO IN WHICH THE COURT DID, IN FACT, GRANT A WRIT OF HABEAS CORPUS REGARDING THE VERY SAME ISSUE, NAMELY, THE EXCLUSION OF BLACKS IN A GRAND JURY IN THIS CASE, THE JAMES CASE, WHICH MR. RIDEAU REFERRED TO EARLIER, THAT CASE INVOLVED THE EXCLUSION OF BLACK GRAND JURY FOREMEN. THE COURT IN THIS CASE, THE JAMES CASE, GRANTED THE WRIT OF HABEAS CORPUS, AND THE COURT TOOK THE TIME TO WRITE SOME 21 PAGES WHICH, IN THE COURT'S OPINION, SUGGESTED THERE MAY HAVE BEEN DISCRIMINATIÓN IN THE SELECTION OF GRAND JURY FOREMEN IN [156] THE PARISH OF ASCENSION. THE COURT GRANTED THE WRIT.

THE FIFTH CIRCUIT COURT OF APPEALS IN A DECISION RENDERED ON DECEMBER 9TH, 1994, REVERSED THIS COURT. AND THE REVERSAL BY THE FIFTH CIRCUIT IS INTERESTING BECAUSE THE EVIDENCE IN THE JAMES CASE PRESENTED AT THE STATE AND FEDERAL COURT LEVELS WAS MUCH GREATER THAN WHAT MR. RIDEAU HAS FILED WITH THIS COURT.

IN THIS CASE, MR. RIDEAU'S CASE, THE ONLY WITNESS CALLED BY MR. RIDEAU AT ALL THE HEARINGS WAS THE CLERK — WAS MR.

HILLEBRANDT. NO GRAND JURORS WERE CALLED. NO OTHER COMMISSIONERS WERE CALLED. NO OTHER EVIDENCE WAS PRESENTED THAT WOULD SUGGEST A PRIMA FACIE CASE OF DISCRIMINATION AS THE PETITIONER DID IN THE JAMES CASE AND AS WAS DONE BY THE PETITIONER IN A CASE THAT WENT BEFORE THE UNITED STATES SUPREME COURT IN ROSE VERSUS MITCHELL IN WHICH AN EXTENSIVE NUMBER OF WITNESSES WERE CALLED IN AN ATTEMPT TO SHOW DISCRIMINATION INSOFAR AS GRAND JURY SELECTION.

IN REVERSING ME IN THE JAMES CASE, THE FIFTH CIRCUIT MADE A NUMBER OF FINDINGS WHICH ARE VERY IMPORTANT TO THIS CASE BECAUSE OF THE FACT THAT A VERY SIMILAR ISSUE IS INVOLVED. AND JUST AS COUNSEL SUGGESTED THAT THE COURT HAS TO FOLLOW THE LAW, I THINK THIS IS SOMETHING THAT THE COURT HAS TO DO, PARTICULARLY WHEN THE COURT HAS JUST BEEN REVERSED BY THE FIFTH CIRCUIT ON A SIMILAR ISSUE.

[157] IN JAMES, THE FIFTH CIRCUIT NOTED, TO MAKE OUT A PRIMA FACIE CASE FOR DISCRIMINATION IN THE SELECTION OF GRAND JURY FOREMEN, JAMES MUST PROVE (1) THE GROUP TO WHICH HE BELONGS IS A RECOGNIZABLE, DISTINCT CLASS THAT RECEIVES DIFFERENT TREATMENT UNDER THE LAWS AS WRITTEN OR APPLIED; (2) THE DEGREE OF UNDERREPRESENTATION BY COMPARING THE PROPORTION OF THE GROUP IN

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THE TOTAL POPULATION WITH THE PROPORTION OF THE GROUP CALLED TO SERVE AS GRAND JURY FOREMEN OVER A SIGNIFICANT PERIOD OF TIME; AND (3) THAT THE SELECTION PROCEDURE IS SUSCEPTIBLE TO ABUSE OR IS NOT RACIALLY NEUTRAL, CITING ROSE VERSUS MITCHELL WHICH I JUST REFERRED TO, AND ALSO QUOTING ANOTHER SUPREME COURT CASE.

THE LOUISIANA FIRST CIRCUIT DENIED JAMES' EQUAL PROTECTION CLAIM BECAUSE HE FAILED TO PROVE THE SECOND ELEMENT OF HIS CLAIM. IN ORAL ARGUMENT BEFORE US, THE STATE CONCEDED THAT JAMES HAD PROVED THE FIRST AND THIRD ELEMENTS, THUS OUR INQUIRY CONCERNS ONLY THE DEGREE OF UNDERREPRESENTATION.

NOW, THIS IS WHAT IS IMPORTANT. THIS IS ONE OF THE THINGS THAT I THINK I HAVE BEEN REFERRING TO DURING ORAL ARGUMENT, THE EVIDENTIARY HEARING TODAY, AND ORAL ARGUMENT A COUPLE OF MONTHS AGO WHEN WE HAD IT, AND THAT IS WHAT PRESUMPTION DOES A FEDERAL COURT HAVE TO GIVE TO A STATE COURT FINDINGS OF FACT UNDER 2254(D).

[158] NOW, I SHOULD HAVE SAID THIS EARLIER, BUT I THINK EVERYBODY AGREES WITH ME, AND I DON'T THINK THIS IS AN ISSUE IN THE CASE, THE NEWLY ENACTED 2254 DOES NOT APPLY IN THIS

PARTICULAR CASE BECAUSE THE APPLICATION WAS FILED AND WAS PENDING AT THE TIME THE NEW HABEAS CORPUS RULES BECAME EFFECTIVE.

THE OLD 28 USC SECTION 2254(D) APPLIES, AND THAT IS THE STANDARD THAT IS DISCUSSED IN THE JAMES CASE, AND THAT IS THE STANDARD THAT THE COURT HAS TO USE IN THIS CASE AND NOT THE NEW PROVISIONS THAT WERE RECENTLY ENACTED BY THE CONGRESS OF THE UNITED STATES.

IN THE JAMES CASE, THE FIFTH CIRCUIT STATED, IN FEDERAL HABEAS PROCEEDINGS, FEDERAL COURTS GENERALLY ACCORD STATE COURT FINDINGS OF FACT A PRESUMPTION OF CORRECTNESS, CITING 28 USC SECTION 2254(D).

EIGHT EXCEPTIONS EXIST TO THIS PRESUMPTION. ONE OF THE EXCEPTIONS IS IF THE RECORD DOES NOT FAIRLY SUPPORT THE FINDING. IF THE RECORD AS A WHOLE DOES NOT FAIRLY SUPPORT THE FINDING, THE FINDING IS NOT ENTITLED TO THE PRESUMPTION OF CORRECTNESS. IF THE RECORD DOES FAIRLY SUPPORT THE FINDING, THE PRESUMPTION OF CORRECTNESS APPLIES, AND THE PETITIONER MUST PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE FINDING IS ERRONEOUS.

NOW, THIS IS WHAT THE JAMES COURT SAID I DID WRONG. THE DISTRICT COURT ERRONEOUSLY

DETERMINED THAT THE RECORD [159] AS A WHOLE DID NOT FAIRLY SUPPORT THE FINDING OF THE LOUISIANA FIRST CIRCUIT THAT JAMES DID NOT ESTABLISH THE NUMBER OF GRAND JURIES CONVENED IN ASCENSION PARISH BETWEEN 1965 AND 1979, NOR THE NUMBER OF FOREMEN APPOINTED. QUESTIONS OF FACT THAT UNDERLIE THE ULTIMATE CONCLUSION ARE GOVERNED BY THE STATUTORY PRESUMPTION. IN REACHING HIS CONCLUSION, THE MAGISTRATE JUDGE COMPARED THE STATISTICAL INFORMATION AVAILABLE IN THIS CASE TO GUICE, ONE, AND JOHNSON. WHEN THE ISSUE IS WHETHER 2254(D)(8) APPLIES, HOWEVER, THE APPROPRIATE ANALYSIS IS WHETHER THE RECORD FAIRLY SUPPORTS THE FINDING, NOT WHETHER THE RECORD SHOWS SUFFICIENT STATISTICAL INFORMATION TO ESTABLISH THE DEGREE OF UNDERREPRESENTATION. THE DETERMINATION OF WHETHER THE RECORD FAIRLY SUPPORTS THE STATE COURT FINDING REQUIRES A HIGH MEASURE OF DEFERENCE. MERE DISAGREEMENT WITH THE STATE COURT FINDING DOES NOT ENTITLE THE FEDERAL COURT TO OVERTURN IT.

NOW, THAT IS THE STANDARD THAT I HAVE TO APPLY IN THIS CASE. AND WHAT THE FIFTH CIRCUIT JUST STATED INSOFAR AS THIS PRESUMPTION IS STATED TIME AND TIME AGAIN IN THE CASES THAT ARE SET FORTH UNDER 2254, MANY OF WHICH PROVIDE SUCH STATEMENTS AS, THE FINDINGS OF STATE COURT WERE

PRESUMPTIVELY CORRECT, DEMPSEY VERSUS WAINWRIGHT, WHICH IS A FIFTH CIRCUIT CASE; FEDERAL HABEAS COURTS MUST ACCORD GREAT WEIGHT TO PRIOR STATE FINDINGS, WILLIAMS VERSUS [160] LAVALLEE, A SECOND CIRCUIT CASE; IN RE: PARKER, IN WHICH THE COURT HELD THAT ONE OF THE PURPOSES OF THIS SECTION WAS TO PROVIDE, PROVIDING THAT IN HABEAS CORPUS PROCEEDINGS STATE COURT DETERMINATIONS OF FACTUAL ISSUES SHALL BE PRESUMED TO BE CORRECT WAS TO ENCOURAGE STATE COURTS TO HOLD EVIDENTIARY HEARINGS IN POST-CONVICTION CASES INVOLVING STATE PRISONERS.

AND THE COURTS HAVE FOLLOWED SUCH A RULE, AS HAS THIS COURT, AND AS WAS NOTED, THE FIFTH CIRCUIT MEANS WHAT IT SAYS WHEN IT REVERSED ME THE LAST TIME THAT I GRANTED A WRIT IN A SIMILAR NATURE SUCH AS THIS.

SO WE TURN TO WHAT EVIDENCE WAS BEFORE THE LOUISIANA STATE COURTS. AND I MUST NOTE INSOFAR AS THE ISSUE OF PREJUDICE IS CONCERNED, IT IS INTERESTING TO POINT OUT THAT IN FOOTNOTE TWO OF JUSTICE BARHAM'S DISSENT IN THE OPINION RELEASED BY THE UNITED STATES — THE LOUISIANA SUPREME COURT ON MAY 7TH, 1973, AND REPORTED AT 278 SO.2D 100, JUSTICE BARHAM, IN TALKING ABOUT SOME STATISTICS, SAYS, THESE FIGURES WERE CONTAINED IN DEFENDANT'S EXHIBITS FILED IN EVIDENCE AT THE HEARING ON THE MOTIONS TO

QUASH BUT THESE EXHIBITS ARE NOT AVAILABLE FOR VERIFICATION OF THE FIGURES SUPPLIED IN THE BRIEF. SO EVEN IN 1973, PART OF THIS RECORD HAD BEGUN TO BE LOST FOR REASONS UNKNOWN TO THIS PARTICULAR COURT.

AS I SAID EARLIER, THE LOUISIANA SUPREME COURT HAS [161] MADE TWO SEPARATE FINDINGS OF FACT REGARDING WHETHER OR NOT MR. RIDEAU'S MOTION TO QUASH SHOULD HAVE BEEN GRANTED BECAUSE THE GRAND JURY WAS NOT PROPERLY EMPANELED.

ONE OF THE THINGS THAT THE COURT HAS TO NOTE IS THAT IN DETERMINING THE PRESUMPTION OF CORRECTNESS OF STATE COURT FINDINGS, THE COURT ALSO HAS TO APPLY THAT PRESUMPTION TO FINDINGS IMPLICIT IN THE COURT'S REASONS OR DETERMINATION, AND SUCH A MANDATE WAS SET FORTH BY THE FIFTH CIRCUIT IN MCCOY VERSUS CABENA 794 F.2D 177, AT 181 TO 182, AND THIS IS WHAT THE COURT HAS TO DO IN THIS CASE.

IN LOOKING AT THE FINDINGS MADE BY THE LOUISIANA SUPREME COURT AND DISCUSSED ON TWO SEPARATE OCCASIONS, AND AS I THINK CONCEDED BY EVERYONE, THE COURT TOTALLY DIFFERENT AT THE TWO TIMES THAT THE ISSUE WAS BROUGHT BEFORE THAT COURT, THE COURT FOUND THAT MR. RIDEAU FAILED TO PROVE THAT THE VENIRE LIST DID NOT REPRESENT A CROSS-SECTION OF THE COMMUNITY AND THAT THERE

WAS RACIAL DISCRIMINATION IN THEIR COMPOSITION. KEEP IN MIND THAT THE ONLY WITNESS CALLED BY MR. RIDEAU IN SUPPORT OF HIS MOTION WAS THE GENTLEMAN THAT I REFERRED TO EARLIER, MR. HILLEBRANDT, WHOM I THINK WAS THE CLERK OF COURT, BUT HE WAS ALSO A MEMBER OF THE JURY COMMISSION.

NOT ONLY DOES THE COURT HAVE TO SEE WHETHER OR NOT THE SUPREME COURT'S FINDINGS SHOULD BE GIVEN PRESUMPTION, BUT THE COURT ALSO HAS TO APPLY FEDERAL LAW, AND THE [162] FEDERAL LAW IS WHETHER OR NOT IN CALLING ONLY MR. HILLEBRANDT, WHETHER OR NOT IN APPLYING FEDERAL LAW, THE COURT CAN EVEN CONCLUDE THAT MR. RIDEAU HAS, IN FACT, PRESENTED A PRIMA FACIE CASE SUCH THAT THE BURDEN OF PROOF THEN SHIFTS TO THE STATE OF LOUISIANA TO PROVE THAT THE MANNER IN WHICH THE GRAND JURY WAS EMPANELED WAS CONSTITUTIONAL IN NATURE.

IN THE FIRST OPINION RENDERED IN 1966, REHEARING DENIED IN 1967, THE SUPREME COURT IN AN OPINION WRITTEN BY JUSTICE SANDERS CONCLUDED THAT THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO QUASH THE INDICTMENT OR IN ADMITTING CERTAIN EVIDENCE. THE COURT MADE CERTAIN FACTUAL FINDINGS. THE FINDINGS OF THE SUPREME COURT ARE REPORTED IN THE FIRST OPINION AT PAGE 1122, BEGINNING AT 1122, AND THEN GOING OVER TO

1123 OF 249 LA., AND ALSO AT 193 SO.2D 264, BEGINNING AT 268, AND THE COURT STATED — THE LOUISIANA SUPREME COURT STATED IN ITS FIRST OPINION, THE DEFENDANT RESERVED THIS BILL TO THE DENIAL OF HIS MOTION TO QUASH THE INDICTMENT, THE CALCASIEU PARISH GENERAL VENIRE LIST AND THE VENIRE BOX BECAUSE THE GENERAL VENIRE HAD COME PRIMARILY FROM THE LIST OF REGISTERED VOTERS AND DISCRIMINATION HAD BEEN PRACTICED IN SELECTING CALCASIEU PARISH GRAND JURY THAT INDICTED THE DEFENDANT. THE DEFENDANT CHARGED THAT THERE HAD BEEN A SYSTEMATIC TOKEN INCLUSION OF NEGROES ON THE GRAND JURY. FAIRNESS IN [163] THE FORMATION OF THE JURY BODIES IS A FUNDAMENTAL REQUIREMENT LONG RECOGNIZED BY THIS COURT.

AND THE COURT NEEDS TO PAUSE IN THIS QUOTE TO ALSO SUGGEST THAT AS POINTED OUT BY THE MAGISTRATE JUDGE, AS CONCEDED BY ALL THE PARTIES, AND AS FOUND BY THIS COURT WHEN I WROTE THE JAMES CASE, THAT THIS CONSTITUTIONAL RIGHT IS ONE OF THE MOST FUNDAMENTAL CONSTITUTIONAL RIGHTS THERE IS IN THAT THE JUSTICE SYSTEM CANNOT EXIST WHERE THERE IS DISCRIMINATION AGAINST A CERTAIN RACE, AND THE COURTS HAVE LONG HELD THAT DISCRIMINATION AGAINST BLACKS IN THE SELECTION OF GRAND JURIES IS A VIOLATION OF THE CONSTITUTION OF THE UNITED STATES. EVEN THOUGH I GOT REVERSED IN THE JAMES

CASE, THE FIFTH CIRCUIT DID NOT OVERTURN ALL OF THIS JURISPRUDENCE, IT MERELY FOUND THAT UNDER THE FACTS OF THAT CASE, I SHOULD NOT HAVE GRANTED THE WRIT.

RETURNING TO THE QUOTE IN THE SUPREME COURT CASE, THE SUPREME COURT CONTINUES, BOTH THE STATE AND FEDERAL CONSTITUTIONS REQUIRE THAT JURY BODIES BE SELECTED WITHOUT DISCRIMINATION BECAUSE OF RACE.

A PLANNED LIMITATION OF THE NUMBER OF NEGROES SELECTED ON THE GRAND JURY IMPOSED ON THE BASIS OF RACE IS PROHIBITED, CITING SOME UNITED STATES SUPREME COURT CASES AS WELL AS SOME LOUISIANA SUPREME COURT CASES.

THE QUESTION OF WHETHER RACIAL OR OTHER [164] DISCRIMINATION HAS BEEN PRACTICED IN THE FORMATION OF THE JURY BODIES IS ONE OF FACT. THE BURDEN OF ESTABLISHING SUCH DISCRIMINATION RESTS UPON THE DEFENDANT. THE JURY COMMISSION OF CALCASIEU PARISH SELECTED THE LIST OF GRAND JURORS ON JANUARY 5TH, 1961, BEFORE THE COMMISSION OF THE CRIME CHARGED. CLEARLY, THEREFORE, NO ACTION OF THE JURY OFFICIALS COULD HAVE BEEN DESIGNED TO PREJUDICE THE DEFENDANT. THE DEFENDANT CALLED ONLY ONE JURY OFFICIAL ON THE MOTION TO QUASH, ACTION (A-C-T-I-O-N) HILLEBRANDT (H-I-L-L-E-B-R-A-N-D-T),

CLERK OF COURT AND EX OFFICIO MEMBER OF THE JURY COMMISSION. HE TESTIFIED THAT IN FORMING THE JURY BODIES, HE CONSIDERED THE VOTER REGISTRATION LISTS, THE CITY DIRECTORY, AND OCCASIONALLY PERSONS UNLISTED IN EITHER OF THESE. HE FURTHER TESTIFIED NO RACIAL DISCRIMINATION WAS PRACTICED IN FORMING THE JURY BODIES. ONE NEGRO SERVED ON THE GRAND JURY THAT INDICTED THE DEFENDANT. WE CONCLUDE, AS DID THE TRIAL JUDGE, THAT THE DEFENDANT HAS FAILED TO ESTABLISH DISCRIMINATION OR ANY IMPROPRIETY IN THE FORMATION OF THE JURY BODIES.

NOW, THAT IS THE FACTUAL CONCLUSION RENDERED BY THE LOUISIANA SUPREME COURT AND THAT WAS IN 1967.

WHEN THE ISSUE CAME BACK BEFORE THE LOUISIANA SUPREME COURT, THE SUPREME COURT DISCUSSED THE ISSUE AGAIN, AND THAT WAS THE OPINION RENDERED AT 278 SO.2D 100 ON MAY 7TH, 1973, THAT I REFERRED TO EARLIER.

[165] IN WRITING THE SECOND OPINION, IN WHICH CASE MR. RIDEAU WAS COMPLAINING NOT ONLY ABOUT THE GENERAL VENIRE AND GRAND JURY VENIRE IN THE PARISH OF CALCASIEU, BUT HIS MOTION ALSO PERTAINED TO THE GENERAL VENIRE LIST AND PETIT JURY VENIRE OF EAST BATON ROUGE PARISH WHICH IS NOT AN ISSUE, AS I UNDERSTAND, ON THIS MOTION.

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AND THE FIFTH CIRCUIT, EXCUSE ME, THE LOUISIANA SUPREME COURT FOUND AGAIN THAT THERE WAS NO DISCRIMINATION, AND IN BEGINNING THE OPINION BEFORE QUOTING WHAT IT HAD ORIGINALLY WROTE IN ITS FIRST OPINION WHICH FOUND AS A MATTER OF FACT THAT MR. RIDEAU DIDN'T PROVE HIS CASE, THE SUPREME COURT OF LOUISIANA NOTED THAT THE MAJORITY OF THE CONTENTIONS RAISED BY DEFENSE COUNSEL IN THIS BILL OF EXCEPTIONS WERE PRESENTED ON APPEAL AND CONSIDERED BY US IN STATE VERSUS RIDEAU, 249 LA. 1111, 193 SO.2D 264, 268, 1967, AND THEY RE-QUOTED WHAT THEY FOUND IN THAT PARTICULAR CASE. AND THEY AGAIN REAFFIRMED THEIR DECISION AND MADE SEVERAL ADDITIONAL COMMENTS. PURPOSEFUL DISCRIMINATION MAY NOT BE ASSUMED OR MERELY ASSERTED, IT MUST BE PROVED. A DEFENDANT WHO CLAIMS DISCRIMINATION HAS THE BURDEN OF ESTABLISHING THAT SUCH WAS THE FACT. THE MERE ESTABLISHMENT OF DISPARITY BETWEEN THE NUMBER OF NEGROES ON A VENIRE LIST AND THE NUMBER OF WHITES DOES NOT MAKE A PRIMA FACIE CASE OF DISCRIMINATION WHICH MUST STAND WHERE NOT REBUTTED BY THE STATE. THE TESTIMONY ATTACHED [166] TO THE BILL SHOWS THAT THE VENIRE OF EAST BATON ROUGE PARISH AT THE TIME OF THE THIRD TRIAL AND IMMEDIATELY PRIOR THERETO REPRESENTED A CROSS-SECTION OF THE COMMUNITY.

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EARLIER THEY HAD FOUND THAT THERE WAS NOTHING WRONG WITH THE JURY VENIRE SELECTION IN CALCASIEU PARISH.

THE LOUISIANA SUPREME COURT CONCLUDED THAT THE DEFENDANT DID NOT BEAR HIS BURDEN OF PROOF.

NOW, IN A CONCURRING OPINION, WHICH WAS WRITTEN BY NOW CHIEF JUSTICE CALOGERO, THEN JUSTICE CALOGERO STATED AS FOLLOWS: THE SHOWING MADE BY THE DEFENDANT AT THE HEARING ON THE MOTION TO QUASH THE GENERAL VENIRE LIST AND GRAND JURY VENIRE FOR CALCASIEU PARISH, AN INDICTMENT RENDERED BY THE GRAND JURY FOR THE PARISH OF CALCASIEU AND THE SHOWING MADE TO QUASH THE GENERAL VENIRE LIST AND THE PETIT JURY VENIRE FOR THE PARISH OF EAST BATON ROUGE WAS ENTIRELY INADEQUATE TO SUPPORT HIS ALLEGATIONS OF DISCRIMINATION. AND JUSTICE CALOGERO, FOR WHATEVER REASON, CHOSE TO MAKE THAT SPECIFIC POINT IN HIS CONCURRING OPINION.

NOW, THE ISSUE BEFORE ME NOW IS, AS A FEDERAL JUDGE, DO I SUBSTITUTE MY OWN FINDINGS OR MY OWN FEELINGS FOR THAT OF THE LOUISIANA SUPREME COURT WHICH HAS ON TWO OCCASIONS RENDERED FACTS THAT HAVE NOT BEEN UPSET BY ANY OTHER FEDERAL COURT, NAMELY, THE UNITED STATES SUPREME [167]

COURT OR CHALLENGED IN THIS COURT BY CLEAR AND CONVINCING EVIDENCE THAT THE FACTUAL FINDINGS AS MADE BY THE LOUISIANA SUPREME COURT ARE INCORRECT, AND MR. RIDEAU HAS SIMPLY NOT ESTABLISHED (1) A PRIMA FACIE CASE THAT WOULD SHIFT THE BURDEN, AND (2) HAS NOT ESTABLISHED THAT THE LOUISIANA SUPREME COURT, HAS NOT ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT THE OPINION OF THE LOUISIANA SUPREME COURT WAS NOT SUPPORTED BY THE EVIDENCE PRESENTED BEFORE THE COURT.

THERE HAS TO BE A TIME WHEN A CASE ENDS, AND THERE HAS TO BE A TIME WHEN DECISIONS RENDERED BY THE STATE COURTS BE FINAL AND BE UPHELD AND NOT MERELY BE OVERTURNED FOR WHATEVER REASON BY FEDERAL COURTS UNLESS THERE IS JUST REASON IN ACCORDANCE WITH THE LAW AND FACTS OF THE CASE TO DO SO.

ONE OF THE THINGS THAT I LOOK AT IN THIS CASE IS TO COMPARE WHAT WAS PRESENTED IN THE RIDEAU CASE WITH WHAT I HAD IN JAMES WHICH WAS REVERSED BY THE FIFTH CIRCUIT, AND WHAT WAS PRESENTED IN THE ROSE V. MITCHELL CASE WHICH WAS DECIDED BY THE UNITED STATES SUPREME COURT IN 1979 WHERE NUMEROUS WITNESSES WERE CALLED ON BEHALF OF THE DEFENDANT IN THAT CASE AND DESPITE THE FACT THAT THESE NUMEROUS WITNESSES

WERE CALLED, THE SUPREME COURT IN SETTING OUT THE STANDARD THAT WE ARE TO FOLLOW (1) REAFFIRMS THE DEFENDANT'S CRIMINAL RIGHT TO EQUAL PROTECTION UNDER THE [168] LAWS WHEN HE IS INDICTED BY A GRAND JURY FROM WHICH MEMBERS OF A RACIAL GROUP PURPOSELY HAVE BEEN EXCLUDED, BUT AT THE SAME TIME GIVING DEFERENCE TO FINDINGS MADE BY THE STATE COURT WHERE THE DEFENDANT HAS FAILED TO EITHER MAKE A PRIMA FACIE CASE OR TO PROVE HIS CASE UNDER THE FACTS PRESENTED TO THOSE PARTICULAR COURTS.

SO, THE COURT FINDS ON THE MERITS THAT THE FACTUAL FINDINGS MADE BY THE LOUISIANA SUPREME COURT SHOULD NOT BE DISTURBED.

THE COURT FINDS THAT THE DEFENDANT, AND I USE DEFENDANT INTERCHANGEABLY HERE, BUT THE COURT FINDS THAT MR. RIDEAU HAS FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE COURT SHOULD NOT ADOPT THE FACTUAL FINDINGS MADE BY THE LOUISIANA SUPREME COURT.

THIS COURT, IN APPLYING THOSE FACTS TO THE FEDERAL STANDARD AS SET FORTH BY THE UNITED STATES SUPREME COURT FOR MANY YEARS, FINDS, AS DID THE LOUISIANA SUPREME COURT, THAT MR. RIDEAU HAS FAILED TO MAKE A PRIMA FACIE CASE AND, IN FACT, HAS MADE A

VERY POOR SHOWING OF FACTS TO SUPPORT HIS CLAIM. AND EVEN IF THE COURT CONSIDERED THE STATISTICS WHICH HAVE NOW BEEN PRESENTED TO THIS COURT, THE COURT DOES NOT BELIEVE THAT THAT PROFFER IS SUCH THAT IT WOULD CONSTITUTE CLEAR AND CONVINCING EVIDENCE SUCH THAT THE COURT SHOULD NOT GIVE A PRESUMPTION OF CORRECTNESS TO THE FACTUAL FINDINGS MADE BY THE LOUISIANA [169] SUPREME COURT ON THIS ISSUE.

SO, TO SUMMARIZE ALL OF MY FINDINGS, (1) I FIND THAT RULE 9(A) APPLIES AND MR. RIDEAU HAS WAITED TOO LONG TO FILE THIS SUIT. AND IN SO HOLDING, THE COURT FINDS THAT THE STATE HAS ESTABLISHED THE REQUISITE PREJUDICE ON THE ISSUES INVOLVED, AND I MUST SAY PARTICULARIZED SHOWING OF PREJUDICE ON THE ISSUES INVOLVED AND THAT THE PREJUDICE WAS CAUSED BY THE PETITIONER HAVING FILED A LATE PETITION AND THAT THE PETITIONER HAS FAILED TO ACT WITH REASONABLE DILIGENCE AS A MATTER OF LAW.

THE COURT FURTHER FINDS THAT MR. RIDEAU HAS FAILED IN HIS BURDEN WHICH SHIFTS TO HIM TO SHOW THAT THE STATE ACTUALLY IS NOT PREJUDICED OR THAT HIS DELAY IS BASED ON GROUNDS ON WHICH HE COULD HAVE HAD KNOWLEDGE BY THE EXERCISE OF REASONABLE DILIGENCE BEFORE THE CIRCUMSTANCES PREJUDICIAL TO THE STATE OCCURRED.

THE COURT FURTHER FINDS THAT THERE IS NO EVIDENCE OF ACTUAL INNOCENCE PRESENTED TO THE COURT WHICH WOULD SUGGEST TO THE COURT THAT EVEN THOUGH THE STATE HAS BEEN PREJUDICED, AS REQUIRED UNDER RULE 9(A), AND UNDER THE WALTERS V. SCOTT DECISION OF THE FIFTH CIRCUIT, THAT THE COURT IN THE EXERCISE OF ITS DISCRETION SHOULD NOT LET AN INNOCENT PERSON REMAIN INCARCERATED BECAUSE OF ITS RULE 9(A) HOLDING.

AND THE COURT FINDS THAT MR. RIDEAU HAS NOT FILED ANY [170] EVIDENCE OF ACTUAL INNOCENCE THAT WOULD SUGGEST TO THE COURT THAT THE COURT SHOULD GRANT THE RELIEF OR PROCEED TO THE MERITS TO GRANT THE RELIEF REQUESTED.

ON THE OTHER HAND, THE STATE HAS, IN FACT, ESTABLISHED MR. RIDEAU'S GUILT, AS HAVE ALL THE OPINIONS WHICH HAVE BEEN RENDERED ON THE ISSUE OF GUILT BY THE LOUISIANA AND UNITED STATES SUPREME COURTS. BUT OUT OF AN ABUNDANCE OF CAUTION, AND IN THE INTEREST OF JUSTICE AND JUDICIAL ECONOMY, THE COURT, IN THE ALTERNATIVE, PROCEEDS TO THE MERITS AND FINDS THAT THE HOLDING OF THE LOUISIANA SUPREME COURT SHOULD NOT BE DISTURBED AS A MATTER OF FACT AND LAW.

THE COURT FURTHER FINDS, IN MAKING ITS OWN DE NOVO DETERMINATION OF THE LAW, BASED ON THE FACTS FOUND BY THE LOUISIANA

SUPREME COURT, THAT THE PLAINTIFF NOT ONLY HAS FAILED TO MAKE A PRIMA FACIE SHOWING — THE DEFENDANT, MR. RIDEAU, HAS SIMPLY NOT MADE ANY SHOWING THAT WOULD CAUSE THE COURT TO REVERSE THIS CONVICTION.

THE COURT ALSO FINDS THAT MR. RIDEAU HAS FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE WHICH WOULD CAUSE THIS COURT TO DISTURB THE FINDING MADE BY THE HIGHEST COURT OF THE STATE OF LOUISIANA ON THE ISSUE INVOLVED, AND FOR THESE REASONS WHICH UNDER RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE CONSTITUTE THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND RESERVING TO THE COURT THE [171] RIGHT TO SUPPLEMENT ITS ORAL REASONS RENDERED TODAY WITH WRITTEN REASONS IF NECESSARY, AND POINTING OUT FOR THE RECORD THAT WHETHER DISCUSSED HEREIN OR NOT, ALL THE ISSUES AND CONTENTIONS RAISED BY THE PARTIES HAVE BEEN CONSIDERED BY THE COURT, WHETHER SPECIFICALLY DISCUSSED HEREIN OR NOT, THE COURT (1) REJECTS THE MAGISTRATE JUDGE'S REPORT; (2) FINDS THAT MR. RIDEAU'S APPLICATION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED; AND JUDGMENT WILL BE ENTERED DISMISSING THE WRIT OF HABEAS CORPUS AND THIS SUIT WITH PREJUDICE.

AND, FINALLY, THE COURT WILL AUTHORIZE THE STATE OF LOUISIANA TO RETURN MR. RIDEAU TO THE LOUISIANA STATE PENITENTIARY AT ANGOLA.

Appendix B

ONE FINAL STATEMENT, I SAID IN THE OPINION, AND I SAY AGAIN, THIS CASE NO LONGER BELONGS IN THE COURT. THERE COMES A TIME WHEN JUDGMENTS OUGHT TO BE FINAL.

WE ARE NOW APPROACHING 40 YEARS FROM THE DATE OF THE CRIME. WHAT THIS CASE IS NOT ABOUT IN THIS COURT IS WHETHER OR NOT MR. RIDEAU HAS BEEN REHABILITATED. IT IS NOT AN ISSUE BEFORE THIS COURT. THE ISSUE IS NOT WHETHER OR NOT HE IS PROMINENT OR NOT PROMINENT. THE ONLY ISSUE IN THAT REGARD IS WHETHER OR NOT HE EXERCISED REASONABLE DILIGENCE, AND THE COURT FOUND THAT HE HAS NOT.

OBVIOUSLY, THE RIGHTS OF A VICTIM ARE A CONCERN OF THE COURT, BUT IT IS NOT AN ISSUE.

[172] AND, FINALLY, THE ISSUE BEFORE ME IS NOT WHETHER OR NOT MR. RIDEAU SHOULD BE RELEASED FROM PRISON BY THE PARDON BOARD, THE GOVERNOR, OR ANY OTHER BODY OF THE STATE OF LOUISIANA. IT IS A MATTER FOR THE STATE. IT IS NOT A MATTER FOR A FEDERAL JUDGE, AND IT WAS NOT AN ISSUE IN THE COURT'S DECISION IN THIS PARTICULAR CASE.

(WHEREUPON, THE COURT WAS AT RECESS.)

* * * *

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 22, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30849

WILBERT RIDEAU

Petitioner – Appellant

v.

JOHN P WHITLEY

Respondent – Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING EN BANC
(Opinion 12/22/00, 5 Cir., __, __ F.3d __)

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active

service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ James Davis
United States Circuit Judge